

2015

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Recommended Citation

24 Wm. & Mary B. of Rts. J. 37 (2015)

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UNCAPPING COMPENSATION IN THE *GORE* PUNITIVE DAMAGE ANALYSIS

Shaakirrah R. Sanders*

ABSTRACT

BMW of North America, Inc. v. Gore rests, in part, on the “understandable relationship” between a civil jury’s award of compensatory and punitive damages. *Gore* designates Due Process a protectant against excessive civil jury awards, in effect outmaneuvering the civil jury trial right. *Gore* identifies three guideposts to determine whether punitive damages are excessive: (1) the degree of reprehensibility of a defendant’s conduct; (2) the disparity between compensatory and punitive damages; and (3) the difference between punitive damages and civil penalties authorized or imposed in comparable cases.

This Article focuses on the second of *Gore*’s three guideposts, which examines the ratio between compensatory and punitive damages. In many states, compensatory damages are automatically capped in certain categories of tort cases regardless of proven damages. These states impose compensatory damage caps as a remedy for excessive civil jury awards. But no preliminary finding of excessiveness triggers the application of any cap. Except in one state, neither trial judges nor civil juries have authority to determine the fairness of the cap’s application to the injured party.

This Article argues that the second *Gore* guidepost is based on a false premise as it applies in states that have capped compensatory damages—that the plaintiff has been fully reimbursed for actual losses. *Gore* fails to designate which compensatory damage award constitutes the proper starting point for inquiry: the jury’s award or the legislature’s capped award. *Gore*’s progeny rejects the argument that civil jury awards were excessive, which is the major assumption justifying the existence of compensatory damage caps. *Gore*’s progeny also warns that even if civil jury awards had become excessive, compensatory damage caps constituted a misguided remedy. Because there is no standard tort injury, it is inappropriate and impossible to settle upon a

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suitable amount to apply in all cases. Despite these warnings, some state legislatures have continued to impose, and some state supreme courts have continued to uphold, compensatory damage caps.

This Article contributes to existing scholarship on compensatory damage caps and the *Gore* punitive damage analysis by identifying the defect that the former produces in the latter. This Article maintains that capped compensation in state law tort actions also caps the *Gore* punitive damage analysis. This Article advocates uncapping *Gore* where a state's procedures do not allow trial judges the opportunity to review a civil jury's award for reasonableness, where the civil jury has not been informed of the cap's existence, or where the civil jury has no opportunity to affirm an award that exceeds the cap. Without such protections, *Gore* fails to advance its dual obligation in civil litigation to protect defendants against unreasonably high awards and guard severely injured plaintiffs against arbitrarily low awards.

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INTRODUCTION

This Article examines *BMW of North America, Inc. v. Gore*¹ in a different context than existing scholarship—by identifying compensatory damage caps as an overlooked defect in the *Gore* punitive damage analysis. *Gore* rests, in part, on the recognizable and “understandable” relationship between compensatory and punitive damages.² At its core is *Gore*’s assumption that the party entitled to punitive damages has been fully compensated for actual losses.³ But in many states, a jury’s award of compensatory damages is automatically capped in certain categories of tort cases.⁴ These states argue that caps are an appropriate remedy for excessive civil jury awards.⁵ But no preliminary finding of excessiveness triggers application of a compensatory

¹ 517 U.S. 559 (1996).

² See, e.g., *Pac. Mut. Life Ins. v. Haslip*, 499 U.S. 1, 22 (1991).

³ See generally *Gore*, 517 U.S. at 559.

⁴ David F. Maron, *Statutory Damage Caps: Analysis of the Scope of Right to Jury Trial and the Constitutionality of Mississippi Statutory Caps on Noneconomic Damages*, 32 MISS. C. L. REV. 109, 110 (2013).

⁵ *Noneconomic Damages Reform*, AM. TORT REFORM ASS’N, <http://www.atra.org/issues/noneconomic-damages-reform> [<http://perma.cc/4V2W-P3JQ>].

damage cap.⁶ Moreover, except in Massachusetts, neither trial judges nor civil juries have authority to determine the fairness of the cap's application to the injured party.⁷

In an effort to thwart rising insurance costs in the healthcare market, states in the mid-1970s began to mechanically and automatically apply caps against compensatory damage awards in certain categories of personal injury cases, most frequently in medical malpractice cases.⁸ Haley Barbour, the former Governor of Mississippi, pronounced excessive civil jury awards the cause of a medical malpractice crisis of "unprecedented magnitude."⁹ Professor Stephen Yeazell, a prominent contemporary scholar on civil procedure, has described claims of such excessiveness as "political theater."¹⁰ Regardless of the veracity of Barbour's claims, most state legislative records offered little empirical evidence of long-lasting or systemic excessiveness.¹¹ Instead, plaintiff attorneys were cast as villains; their clients: the undeserving beneficiaries of a crippled and unfair system.¹²

The national healthcare debate has since shifted from whether excessive jury awards caused a medical malpractice crisis to whether a crisis ever existed.¹³ In 2004, a Congressional Budget Office (CBO) study found that only 1.5% of people classified as likely victims of medical error actually brought a lawsuit.¹⁴ The CBO also concluded that, based on research from the states, the primary effects of compensatory damage caps were increased profitability for insurers and reduced recovery for

⁶ See *infra* notes 172–92 and accompanying text.

⁷ See MASS. GEN. LAWS ch. 231, § 60H (2015) (allowing the jury to consider whether cap is just and fair).

⁸ Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damage Caps*, 2 N.Y.U. L. REV. 391, 397 (2005).

⁹ Haley Barbour, *Haley's PAC: Tort Reform*, YOUTUBE (Nov. 29, 2010), <https://www.youtube.com/watch?v=AnfXuJ3hKIY>. But see Colleen P. Murphy, *Determining Compensation: The Tension Between Legislative Power and Jury Authority*, 74 TEX. L. REV. 345, 347 (1995) (describing "runaway juries" and the need to "curb excesses" as the impetus for state law compensatory damage caps).

¹⁰ Stephen C. Yeazell, *Unspoken Truths and Misaligned Interests: Political Parties and the Two Cultures of Civil Litigation*, 60 UCLA L. REV. 1752, 1755–64 (2013) (exploring civil litigation and tort reform as a political controversy).

¹¹ See *infra* notes 172–92 and accompanying text.

¹² See Deborah R. Hensler, *Trends in Tort Litigation: Findings from the Institute for Civil Justice Research*, 48 OHIO ST. L.J. 479, 479 (1987) (discussing tort reform and its premises that liability lawsuits have exploded and that civil juries were out of control). But see Yeazell, *supra* note 10, at 1785 (discussing a study that found the effective hourly rate of plaintiff's attorney contingency fees only just slightly exceeded that of insurance defense lawyers).

¹³ See, e.g., Richard Anderson, *Effective Legal Reform and the Malpractice Insurance Crisis*, 5 YALE J. HEALTH POL'Y L. & ETHICS 343, 343–48 (2013) (analyzing whether a malpractice insurance crisis currently exists in the United States).

¹⁴ CONG. BUDGET OFFICE, *THE EFFECTS OF TORT REFORM: EVIDENCE FROM THE STATES* 18 (2004).

plaintiffs.¹⁵ Missouri found its own reforms were likely to have disproportionately burdened the young, the economically disadvantaged, and those who were most severely injured.¹⁶ These classes of plaintiffs are least likely to have the means to pay the upfront costs of bringing a colorable claim for personal injury.

Despite well-established doubt as to the existence of a medical malpractice crisis, states have continued to impose and enforce compensatory damage caps.¹⁷ Not all states have imposed caps. But what constitutes an “excessive” civil jury award varies widely, as the amounts of recovery in cap regimes range between \$250,000 and \$3 million.¹⁸ Caps have been most frequently applied in medical malpractice and wrongful death lawsuits, but some caps apply to all tort cases. Caps also vary with regards to type.¹⁹ The most common type of cap applies to noneconomic damages, which includes damages related to pain, suffering, mental anguish and other emotional distresses, disfigurement, and the loss of consortium or capacity to enjoy life.²⁰ Other caps apply more broadly to economic damages, which includes damages related to medical expenses, lost earnings, and other objectively verifiable monetary losses.²¹

Some compensatory damage caps have been overturned, some have been upheld, and others remain unchallenged under various provisions of state constitutions.²² This Article focuses on state constitutional civil jury trial litigation and the implications of capped compensation on the *Gore* punitive damage analysis. Cap-approving courts hold that legislative authority includes the power to alter common law rights to compensatory damages.²³ Cap-disapproving courts hold that legislatures cannot deny the right to a civil jury’s award of compensation in common law cases.²⁴ The crux of the debate among state supreme courts is whether caps intrude on the civil jury’s constitutionally proscribed fact-finding role to assess responsibility for an injury. In short, states disagree whether the civil jury’s award is fully enforceable.

State supreme courts also disagree on the underlying policy justifications for compensatory damage caps—excessive civil jury awards. Most state legislative records lack evidence of jury bias or widespread and systematic excessiveness. Except in

¹⁵ *Id.* at x, 12.

¹⁶ *Id.* at 4.

¹⁷ *See, e.g.*, VA. CODE ANN. § 8.01-581.15 (West 2011); WIS. STAT. ANN. § 893.55 (West 2008).

¹⁸ *See, e.g.*, CAL. CIV. CODE § 3333.2 (West 2015); VA. CODE ANN. § 8.01-581.15; *see also infra* notes 174–81 and accompanying text.

¹⁹ JAMES M. FISCHER, UNDERSTANDING REMEDIES § 6.5, at 37 (2d ed. 2006).

²⁰ *Id.* at 36–37.

²¹ *Id.* at 36.

²² Maron, *supra* note 4, at 110.

²³ *See, e.g.*, DRD Pool Serv. v. Freed, 5 A.3d 45, 50 n.5 (Md. 2010) (declining to overrule a previous decision that statutory cap on noneconomic damages violated the common law right to a civil jury trial).

²⁴ *See, e.g.*, Atlanta Oculoplastic Surgery, P.C. v. Nestlehurst, 691 S.E. 2d 218 (Ga. 2010) (striking down a compensatory cap for violating the common law right to a civil jury trial).

Massachusetts, the cap automatically applies despite the jury's finding that the plaintiff is entitled to a higher compensatory damage award.²⁵ Application of most caps is not triggered by a finding of excessiveness and trial judges are stripped of any authority to determine whether application of the cap is just or fair. Caps apply regardless of: (1) the nature of the injury; (2) the degree or length of pain, suffering, disfigurement, or mental anguish experienced by the injured party; and (3) the injured party's age or other personal characteristics that directly relate to the entitlement to compensation.²⁶

Although the state supreme courts' split on the constitutionality of compensatory damage caps is troubling, so too is the application of capped compensation in the *Gore* punitive damage analysis. Prior to *Gore*, the Court remained unpersuaded that large proportions between punitive and compensatory damages were unreasonable.²⁷ The Court also declined to draw a "mathematical bright line" between constitutionally acceptable and unacceptable awards.²⁸ Instead, the jury's award was entitled to a strong presumption of validity.²⁹ Pre-*Gore*, the Court limited review of punitive damages to a determination of whether the award lacked objective criteria, whether the jury was properly instructed, and whether the award was subject to a meaningful post-verdict hearing.³⁰

Gore represented a significant departure from its predecessors and established three guideposts to determine whether a civil jury's punitive damage award was reasonable: (1) the degree of reprehensibility of a defendant's misconduct; (2) the disparity between compensatory and punitive damages; and (3) the difference between punitive damages and civil penalties authorized or imposed in comparable cases.³¹ Later in *State Farm Automobile Insurance Company v. Campbell*,³² the Court articulated five subfactors that applied to an examination of the first *Gore* guidepost—degree of reprehensibility.³³ The Court also clarified the second *Gore* guidepost—the disparity between compensatory and punitive damages.³⁴ On this

²⁵ See David Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109, 1121–22 (1995) (discussing how caps apply regardless of the specific facts of the case).

²⁶ See generally *id.* at 1122.

²⁷ *Pac. Mut. Life Ins. v. Haslip*, 499 U.S. 1, 23–24 (1991).

²⁸ *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 433, 453–66 (1993).

²⁹ *Id.* at 457, 463–65.

³⁰ See, e.g., *id.* at 444–45.

³¹ *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574–75 (1996).

³² 538 U.S. 408 (2003).

³³ *Id.* at 419. These subfactors included: (1) whether the harm was physical versus economic; (2) whether the harm involved indifference to or a reckless disregard of the health or safety of others; (3) whether the harm was to financially vulnerable victims; (4) whether the harm involved repeated actions rather than an isolated incident; and (5) whether the harm was the result of intentional conduct, rather than an accident. *Id.*

³⁴ *Id.* at 425–26.

factor, the Court reasoned that punitive damages must be “both reasonable and proportionate to the amount of harm” suffered by the plaintiff and “the general damages recovered.”³⁵

Gore implied, and *Campbell* explicitly presumed, that plaintiffs who were entitled to punitive damages had been made whole by an award of compensatory damages,³⁶ which is false in states that cap compensation. *Gore*’s presumption was based in part on the distinction between compensatory and punitive damages.³⁷ According to the Court, damages should be triggered by application of the law rather than caprice.³⁸ Damages should also be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.³⁹ In this respect, the *Gore* punitive damage analysis appears woefully ignorant of the existence of compensatory damage caps. As a result, the Court has failed to designate which compensatory damage award constitutes the proper starting point for the second *Gore* guidepost—the jury’s award *or* the legislature’s capped award. If the starting point is the latter, then the second *Gore* guidepost is arbitrarily skewed in cap regimes.

This Article argues that compensatory damage caps also cap the *Gore* punitive damage analysis. This effect has been largely ignored by current scholarship. *Gore*’s progeny overtly rejected the major assumption justifying the existence of most caps—that civil jury awards had become excessive.⁴⁰ The Court also cautioned that even if excessiveness existed, caps do not constitute a proper remedy.⁴¹ The Court has explained that there were no standard tort injuries and thus it would be inappropriate and impossible to settle upon a suitable damage amount that applied in all cases.⁴² Despite the Court’s counsel, states have continued to impose and uphold compensatory damage caps.

In Part I, this Article discusses *Gore*, its predecessors, and its progeny, which confirm substantive due process as a protectant against excessive damage awards. Part I also examines *Gore*’s excessiveness test for punitive damages and concludes that state law compensatory damage caps create a fundamental defect in the *Gore* punitive damage analysis. In Part II, this Article describes state law compensatory damage caps. Part II also discusses civil jury trial litigation on the constitutionality of caps, which reveals a fundamental disagreement among states about the nature and scope of the civil jury trial right. In Part III, this Article argues that compensatory damage caps also cap the *Gore* punitive damage analysis. Part III advocates uncapping compensation in the *Gore* excessiveness test under three circumstances.

³⁵ *Id.* at 426.

³⁶ *Id.*; *Gore*, 517 U.S. at 574.

³⁷ *See Campbell*, 538 U.S. at 425–26; *Gore*, 517 U.S. at 574–75.

³⁸ *Campbell*, 538 U.S. at 426.

³⁹ *Id.*

⁴⁰ *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 497–98 (2008).

⁴¹ *Id.* at 497–99.

⁴² *Id.* at 506.

First, *Gore* should be uncapped where procedures do not allow trial judges the opportunity to review a civil jury's award for reasonableness (or if the trial judge has had such opportunity and confirms an award that exceeds the cap). Second, *Gore* should be uncapped if the civil jury has not been informed of the existence of a compensatory damage cap (or if the civil jury has been so informed but still awards damages that exceed the cap). Finally, *Gore* should be uncapped where the civil jury has no opportunity to reconsider or confirm an award that exceeds the cap (or where the civil jury has had such opportunity and affirmed an award that exceeds the cap). Part III concludes that without such protections, *Gore* fails to advance its dual obligation in civil litigation: to protect civil defendants against unreasonably high awards, and to guard severely injured plaintiffs against arbitrarily low awards.

I. THE *GORE* PUNITIVE DAMAGE ANALYSIS

The United States Supreme Court has long contended with the issue of excessive civil jury awards of punitive damages.⁴³ But only on a few occasions before *BMW of North America, Inc. v. Gore* did the Court express doubt as to the constitutionality of a punitive damage award in an individual case.⁴⁴ For many years excessiveness challenges were rejected or deferred.⁴⁵ For example, in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,⁴⁶ the Court rejected the applicability of the Eighth Amendment's Excessive Fines Clause to punitive damage awards in civil cases between private parties.⁴⁷ Claims of excessiveness under substantive due process were also rejected, but only because the issue was not raised in the lower courts.⁴⁸ Still the Court made clear that due process imposed "some limits" on punitive damages that were the "product of bias or passion," or if the jury's award "was reached in proceedings lacking the basic elements of fundamental fairness."⁴⁹

The Court's punitive damage jurisprudence has long recognized an "understandable relationship" between compensatory and punitive damages, but initially that relationship was incoherent and unclear as to the required nexus between awards.⁵⁰ For some time, the Court rejected arguments that large ratios between punitive and compensatory damages were unconstitutional.⁵¹ This approach was best

⁴³ Jim Gash, *The End of an Era: The Supreme Court (Finally) Butts Out of Punitive Damages for Good*, 63 FLA. L. REV. 525, 526 (2011).

⁴⁴ *Pac. Mut. Life Ins. v. Haslip*, 499 U.S. 1, 9 (1991).

⁴⁵ *Id.* at 12.

⁴⁶ 492 U.S. 257 (1989).

⁴⁷ *Id.* at 271.

⁴⁸ *Id.* at 276–77; *see also* *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71 (1988) (rejecting a challenge to a punitive damage award on due process grounds where the argument was not raised on appeal in lower state court).

⁴⁹ *Browning-Ferris Indus.*, 492 U.S. at 277.

⁵⁰ *Pac. Mut.*, 499 U.S. at 22.

⁵¹ *Id.* at 23–24.

demonstrated in *Pacific Mutual Life Insurance Company v. Haslip*, where punitive damages awarded by an Alabama jury amounted to more than four times the amount of compensatory damages and two hundred times the amount of the plaintiff's out-of-pocket expenses.⁵²

Regardless of the understandable relationship between compensatory and punitive damages, *Pacific Mutual* acknowledged that punitive damages had long been part of American tort law.⁵³ The Court also approved of American tort law's adoption of the common law approach to awarding damages.⁵⁴ In the common law, the issue of damages was first submitted to the jury after which the award was subjected to a reasonableness review by trial and appellate courts.⁵⁵ Thus in *Pacific Mutual*, the Court focused primarily on whether Alabama's procedures properly guided the jury.⁵⁶ The Court reasoned the jury's punitive damage award did not lack objective criteria because the defendant had the full benefit of Alabama's procedural protections.⁵⁷ At

⁵² *Id.* at 23. *Pacific Mutual* concerned an action against a life insurer and an agent for fraud. *Id.* at 6. The insured claimed that the agent continued to accept premium payments from insureds even though the policy had been cancelled without notice to the insureds. *Id.* at 5. Specifically, Ruffin was an agent for both Pacific Mutual Life Insurance Company and Union Fidelity Life Insurance Company, which were distinct and nonaffiliated entities. *Id.* at 4. Representing himself as an agent for Pacific Mutual, Ruffin solicited Roosevelt City for both health and life insurance on behalf of the city's employees. *Id.* Ruffin prepared applications for the city and its employees for life insurance with Pacific Mutual and health insurance with Union. *Id.* Union sent its billings for health premiums to Ruffin at his Pacific Mutual office in Birmingham, Alabama, where Ruffin worked. *Id.* at 5. The city did the same with regards to the premium payments. *Id.* Ruffin ultimately misappropriated the funds and Union notified the agent in charge of Pacific Mutual's Birmingham office about the lapse in health coverage. *Id.* Pacific Mutual's agent did not forward the notices to the city, which remained unaware that the health policies had been cancelled for its employees. *Id.* Suit was brought against Pacific Mutual and Ruffin by a city employee who was denied health coverage by Union and was unable to pay a judgment for medical expenses. *Id.* at 5–6. The case against Pacific Mutual was brought under the theory of respondeat superior. *Id.* at 6.

⁵³ *Id.* at 15.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 19. The Court noted that, although Alabama granted the civil jury discretion in determining punitive damages, such discretion was no greater than that pursued in many other areas of law. *Id.* at 20. "As long as [such] discretion was exercised within reasonable constraints, due process [was] satisfied." *Id.*

⁵⁷ *Id.* Alabama's procedural protections also included a comparative analysis of other punitive damages to ensure a reasonable relationship with the goals of deterrence and retribution. *Id.* at 20–21. Additionally, the Alabama Supreme Court took into account the following criteria to determine whether the award was excessive or inadequate:

(a) whether there was a reasonable relationship between the punitive damage award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct,

the very least, states must have properly instructed the jury and must have conducted a post-verdict hearing review to ensure damages were constitutional.

*TXO Production Corporation v. Alliance Resources Corporation*⁵⁸ also demonstrated, but did not fully articulate the “understandable relationship” between compensatory and punitive damages.⁵⁹ In *TXO Production Corporation*, a West Virginia jury awarded \$19,000 in compensatory damages and \$10 million in punitive damages on a common law claim for slander of title.⁶⁰ The Court rejected the notion that the 526-to-1 ratio between punitive and compensatory damages was *per se* excessive and declined to draw a “mathematical bright line” between constitutionally acceptable and unacceptable awards for every case.⁶¹ Instead, the Court described the punitive damage award against TXO as “close to the line of constitutional permissibility,”⁶² but not close enough to “jar . . . constitutional sensibilities.”⁶³ The Court also looked to whether West Virginia’s procedures for awarding punitive damages were fundamentally fair.⁶⁴ Although the trial court did not articulate the basis for denying TXO’s

the defendant’s awareness, any concealment, and the existence and frequency of past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the ‘financial position’ of the defendant; (e) all costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Id. at 21–22. According to the Court, these criteria demonstrated that sufficiently definite and meaningful constraints were placed on the discretion of Alabama juries in awarding punitive damages. *Id.* at 22.

⁵⁸ 509 U.S. 443 (1993).

⁵⁹ *Id.* at 443–66.

⁶⁰ *Id.* at 446. *TXO Production Corporation* involved a joint oil and gas development project between TXO and Alliance whereby TXO’s geologists concluded that the recovery of oil and gas on a tract of land controlled by Alliance would be “extremely profitable.” *Id.* at 447. Shortly after an agreement was signed by the parties, TXO’s attorneys discovered that mineral rights in the tract at issue had been conveyed to a third party by Alliance’s predecessor in interest. *Id.* at 448. TXO advised Alliance that Alliance’s leasehold interest to oil and gas rights on the tract failed despite TXO’s knowledge that such claim was “frivolous.” *Id.* at 448–49. TXO then attempted to obtain the leasehold interest to the oil and gas rights on the tract by way of a quitclaim deed, which TXO eventually recorded without notice to Alliance. *Id.* at 449. TXO ultimately filed suit after its attempt to renegotiate the royalty agreement with Alliance failed. *Id.* According to the West Virginia Supreme Court of Appeals, TXO’s lawsuit was an unsuccessful attempt to renegotiate royalty payments and thereby “increase its interest in the oil and gas rights” to the tract. *Id.* Alliance responded to TXO’s lawsuit by filing a counterclaim for slander which was successfully tried before a jury. *Id.* at 450–51.

⁶¹ *Id.* at 458.

⁶² *Id.* at 459.

⁶³ *Id.* at 462.

⁶⁴ *Id.* at 457.

motions for judgment notwithstanding the verdict and for remittitur as to the punitive damage award, such failures did not constitute a constitutional violation.⁶⁵ Thus, the jury's award was entitled to a strong presumption of validity, which TXO failed to adequately rebut considering the amount at stake and TXO's bad faith as evidenced by a pattern of fraud, trickery, and deceit.⁶⁶

BMW of North America, Inc. v. Gore finally articulated the "understandable relationship" between compensatory and punitive damages and pronounced a tangible framework for analyzing the reasonableness of punitive damage awards.⁶⁷ *Gore* involved a claim for failing to disclose predelivery damage to a car sold as new when in fact the car had been repainted before the sale.⁶⁸ A civil jury awarded \$4,000 in compensatory damages and \$4 million in punitive damages based on the finding that BMW's nondisclosure of the presale repainting constituted gross, oppressive, or malicious fraud.⁶⁹ The Alabama Supreme Court reduced the punitive award to \$2 million because the jury's computation of damages improperly considered conduct beyond Alabama's jurisdiction.⁷⁰

As noted by Justice Ginsburg, *Gore* represented the Court's first invalidation of a civil jury's punitive damage award.⁷¹ *Gore* required punitive damages to be reasonable and measured rationality as that which was necessary to vindicate the State's legitimate interest to protect its own citizens.⁷² *Gore* illuminated three guideposts to analyze reasonableness and rationality in an individual case: (1) the degree of reprehensibility of a defendant's misconduct;⁷³ (2) the disparity between

⁶⁵ *Id.* at 465.

⁶⁶ *Id.* at 457, 465.

⁶⁷ 517 U.S. 559, 562 (1996) (citing *TXO*, 509 U.S. at 433).

⁶⁸ *Id.* Dr. Ira Gore, Jr.'s discovery of the deception was unlikely, except he sought to make his BMW sports sedan "snazzier." *Id.* at 563. Mr. Slick, proprietor of the independent detailer "Slick Finish," informed Dr. Gore that the car had been repainted. *Id.* Feeling he had been cheated, Dr. Gore brought a lawsuit for compensatory and punitive damages. *Id.*

⁶⁹ *Id.* at 565. At trial, BMW acknowledged its "nationwide policy" of selling cars as new if predelivery damage did not exceed 3% of the suggested retail price. *Id.* at 563–64. This policy began in 1983. *Id.* According to BMW, the cost of repainting Dr. Gore's car was \$601.37, or 1.5% of the suggested retail price. *Id.* at 564.

⁷⁰ *Id.* at 567. Dr. Gore presented evidence that BMW sold 983 refurbished cars as new, but only 14 of those were sold within Alabama. *Id.* at 564.

⁷¹ *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408, 430–31 (2003) (Ginsburg, J., dissenting).

⁷² *Gore*, 517 U.S. at 568.

⁷³ *Id.* at 574–75. The Court labeled degree of reprehensibility the most important indicium of reasonableness and reasoned that punitive damages should reflect the enormity of the defendant's offense. *Id.* at 575. Drawing an analogy from criminal law, the Court opined that "some wrongs are more blameworthy than others." *Id.* 575–76 (describing nonviolent crimes as "less serious than crimes marked by violence or the threat of violence") (citation omitted). The Court was unconvinced that BMW should be treated as a recidivist primarily because BMW's misrepresentations were immaterial. *Id.* at 579.

compensatory and punitive damages;⁷⁴ and (3) the difference between punitive damages and civil penalties authorized or imposed in comparable cases.⁷⁵ *Gore* ultimately found the \$2 million punitive award so “grossly excessive” that it transcended constitutional limits.⁷⁶ This finding was based on the fact that damages were purely economic⁷⁷ and on the “breathtaking” 500-to-1 ratio between punitive and compensatory damages.⁷⁸

Clarification of *Gore*’s first two guideposts was provided in *State Farm Mutual Automobile Insurance Company v. Campbell*,⁷⁹ which also involved a successful excessiveness challenge to a punitive damage award.⁸⁰ *Campbell* arose after personal injuries were sustained in an automobile accident⁸¹ for which State Farm’s insured was found liable.⁸² State Farm refused to cover the \$185,849 damage award or further indemnify its insured even after refusing a pretrial settlement offer of \$50,000.⁸³ Claims of bad-faith failure to settle an insurance matter, fraud, and intentional infliction of emotional distress were brought against State Farm.⁸⁴ Judgment was entered in the amount of \$2.6 million for compensatory damages and \$145 million for

⁷⁴ *Id.* at 574–75. The Court described this as the second most commonly cited indicium of reasonableness. *Id.* at 580. The Court defined the proper inquiry as asking whether there was a reasonable relationship between the punitive damage award and the harm that is likely to result or that actually resulted from the defendant’s conduct. *Id.* at 581 (citation omitted). While the constitutional line is not marked by a simple mathematical formula, the relevant ratio should not exceed 10-to-1. *Id.* However, the Court conceded that such a line would not fit every case. *Id.* at 582. For example, a low compensatory award may support a higher ratio where particularly egregious acts result in only a small amount of economic damage. *Id.* A higher ratio between compensatory and punitive damage awards may be justified in cases where the injury or noneconomic damage was hard to detect or monetize. *Id.*

⁷⁵ *Id.* at 574–75.

⁷⁶ *Id.* at 585–86.

⁷⁷ *Id.* at 576.

⁷⁸ *Id.* at 582–83.

⁷⁹ 538 U.S. 408 (2003).

⁸⁰ *Id.* at 412.

⁸¹ *Id.* at 412–13. Curtis Campbell arguably caused a collision when he decided to pass six vans traveling ahead of him on a two-lane highway. *Id.* at 412. As Campbell approached, an oncoming driver lost control of his automobile and collided with a third vehicle. *Id.* at 412–13. While Campbell escaped without injury, the third driver was killed and the second driver, who swerved to avoid Campbell, was permanently disabled. *Id.* at 413. Campbell denied fault, which may have been supported by early investigations. *Id.*

⁸² *Id.* at 413.

⁸³ *Id.* State Farm declined offers to settle at the policy limit of \$25,000 per injured driver, of which there were two. *Id.* After the trial, State Farm advised Campbell to sell his property to “get things moving.” *Id.*

⁸⁴ *Id.* at 413–14. Pending appeal, Campbell entered into a settlement whereby the plaintiffs agreed not to pursue enforcement of the prior damage award in exchange for Campbell’s pursuit of a bad-faith action against State Farm. *Id.* Campbell also promised the accident victims 90% of any award against State Farm in the subsequent litigation. *Id.*

punitive damages.⁸⁵ The trial court reduced the awards to \$1 million and \$25 million, respectively.⁸⁶ The Utah Supreme Court reinstated the \$145 million punitive damage award, but agreed compensatory damages amounted to \$1 million.⁸⁷ The *Campbell* Court affirmed that procedural and substantive constitutional limits applied to damage awards and held that due process prohibited punishment that was grossly excessive or arbitrary.⁸⁸

Campbell articulated five subfactors that applied to an examination of the first *Gore* guidepost—degree of reprehensibility.⁸⁹ These subfactors included: (1) whether the harm was physical versus economic; (2) whether the harm involved indifference to or a reckless disregard of the health or safety of others; (3) whether the harm was to financially vulnerable victims; (4) whether the harm involved repeated actions rather than an isolated incident; and (5) whether the harm was the result of intentional conduct, rather than an accident.⁹⁰

Campbell also clarified the second *Gore* guidepost—the disparity between compensatory and punitive damages. On this factor the Court reasoned that the measure of punishment must be both reasonable and proportionate to the amount of harm suffered by the plaintiff and the general damages recovered.⁹¹ The Court also mandated that single-digit ratios or multipliers between compensatory and punitive damages were more likely to comport with due process.⁹² The *Campbell* Court ultimately found the reinstated punitive damage award excessive.⁹³

Campbell expanded *Gore* and explicitly presumed that “a plaintiff ha[d] been made whole for his injuries by compensatory damages.”⁹⁴ This presumption was based in part on the distinction between compensatory damages, which were “intended to redress the concrete loss”⁹⁵ and punitive damages, which were awarded only where further sanctions were necessary to achieve the goals of deterrence and retribution.⁹⁶

⁸⁵ *Id.* at 415.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 416.

⁸⁹ *Id.* at 419.

⁹⁰ *Id.* In its application of the subfactors to the facts, the Court conceded that State Farm’s conduct merited no praise, but “a more modest punishment for [State Farm’s] reprehensible conduct could have satisfied the State’s legitimate objectives.” *Id.* at 419–20. The Court was also unconvinced that State Farm should be treated as a recidivist. *Id.* at 423.

⁹¹ *Id.* at 426. The Court reaffirmed there was no bright-line ratio which a punitive damage award cannot exceed. *Id.* at 425.

⁹² *Id.* The Court identified single-digit multipliers as sufficient to achieve a State’s goals of deterrence and retribution. *Id.* The Court reasoned that the 145-to-1 ratio involved in *Campbell* was presumptively unreasonable. *Id.* at 426.

⁹³ *Id.* at 429.

⁹⁴ *Id.* at 419.

⁹⁵ *Id.* at 416 (citing *Cooper Indus. v. Leatherman Tool Grp.*, 532 U.S. 424, 432 (2001)).

⁹⁶ *Id.* (citing *Cooper Indus.*, 532 U.S. at 432).

According to *Campbell*, damages should be triggered by application of the law rather than caprice.⁹⁷ *Campbell* also made clear that punitive damage awards “must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.”⁹⁸ *Campbell* maintained that “*Gore* must be implemented to ensure both reasonableness and proportionality.”⁹⁹

Gore, and by extension *Campbell*, appear woefully ignorant of compensatory damage caps. Professors David Baldus, John MacQueen, and George Woodworth agree, and argue that caps are “completely unrelated to the level of compensable harm suffered by the plaintiff.”¹⁰⁰ But *Campbell* assumes recovery of damages dictated by the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.¹⁰¹ *Campbell* also assumes compensatory damages represent the amount of harm suffered by the plaintiff.¹⁰² A damage award pursuant to a compensatory damage cap rebuts both assumptions and directly implicates the second *Gore* guidepost, which measures the ratio between compensatory and punitive damages.¹⁰³

Neither *Gore* nor *Campbell* designate which award constitutes the proper starting point for the second *Gore* guidepost—the jury’s award of compensatory damages or the legislature’s “capped” compensatory damage award. If the answer is the latter, then the ratio that constitutes the second *Gore* guidepost is undoubtedly skewed in cap regimes. Moreover, a compensatory award that is dictated by a damage cap ignores the connection in the common law and in the United States legal tradition between the severity of harm and the amount of damages. This undermines the relationship between compensatory and punitive damage awards, which in cap regimes is no longer understandable.

Gore and *Campbell* also ignore that capped compensation results in a procedure where compensatory damage awards are no longer closely aligned with their traditional purpose—to compensate for actual losses or injuries. No evidence suggests that current procedures for selecting a civil jury lack sufficient safeguards.¹⁰⁴ In fact, there are many procedural safeguards that apply to the jury selection process.¹⁰⁵

⁹⁷ *Id.* (citing *Cooper Indus.*, 532 U.S. at 436).

⁹⁸ *Id.* at 425. The Court noted that based on the facts of the case, Campbell received “complete compensation.” *Id.* at 426. The Court reasoned that Campbell’s injuries were economic, not physical, and of only a temporary duration. *Id.* The Court also opined that the damage awards were likely duplicative because much of the distress Campbell suffered was a component of both compensatory and punitive damages. *Id.*

⁹⁹ *Id.* at 428.

¹⁰⁰ Baldus et al., *supra* note 25, at 1122–23 (arguing that compensatory damage caps do little more than “shift the costs of accidents from defendants to injured plaintiffs as a means of reducing insurance premiums”).

¹⁰¹ *See Campbell*, 538 U.S. at 425–26.

¹⁰² *Id.* at 416.

¹⁰³ *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996).

¹⁰⁴ *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 433, 456–57 (1993).

¹⁰⁵ *Id.* at 456.

First, the trial court (as well as the parties) must be satisfied that each individual juror is impartial and unbiased.¹⁰⁶ Next, the jury engages in a process of collective deliberation of the evidence and the arguments of the parties.¹⁰⁷ The trial judge acts as gatekeeper by determining the admissibility of evidence and the applicable law.¹⁰⁸ The trial judge has also heard all of the testimony and is in a position to review the jury's assessment of the award.¹⁰⁹ Finally, an appellate court has authority to affirm or overturn the entire process if an error has occurred.¹¹⁰ Compensatory damage caps displace this process.¹¹¹ Instead, a legislative determination of damages applies uniformly and with no consideration of the facts.¹¹² As argued by Baldus, MacQueen, and Woodworth, such legislative interference intrudes into the domain of judicial and jury decision making.¹¹³

Recent applications of *Gore* and *Campbell* confirm the importance of procedures for awarding damages in civil cases. *Phillip Morris USA v. Williams*¹¹⁴ concerned claims of negligence and deceit brought by the widow of a cigarette smoker.¹¹⁵ The civil jury awarded compensatory damages in the amount of \$821,000 on the claim of deceit, of which \$21,000 constituted economic damages and \$800,000 constituted noneconomic damages.¹¹⁶ The jury also awarded punitive damages in the amount of \$79.5 million,¹¹⁷ but the trial judge found that award excessive and reduced it to \$32 million.¹¹⁸ Both the Oregon Court of Appeals and the Oregon Supreme Court rejected the trial court's finding of excessiveness and upheld the jury's original award.¹¹⁹ The *Phillip Morris* Court affirmed that federal constitutional limits apply

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 456–57.

¹⁰⁸ *Id.* at 457.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See Baldus et al., *supra* note 25, at 122.

¹¹² See *id.*

¹¹³ See *id.* at 1169–70 (describing the difficulty of identifying the high and low dollar range of reasonableness).

¹¹⁴ 549 U.S. 346 (2007).

¹¹⁵ *Id.* at 349.

¹¹⁶ *Id.* at 350. The jury found that Mr. Williams's death was caused by smoking, a habit he developed in part "because he thought it was safe to do so." *Id.* at 349. The jury also found that Phillip Morris knowingly and falsely led Mr. Williams to believe that smoking was safe. *Id.* at 350. This ultimately led the jury to find that Phillip Morris was negligent and had engaged in deceit. *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 350–52. The Oregon Court of Appeals rejected Phillip Morris's arguments that (1) the trial court erred in failing to instruct the jury that punitive damages could not be awarded to nonparties, and (2) the 100-to-1 ratio between punitive and compensatory damages was grossly excessive in light of *Gore* and *Campbell*. *Id.* at 350–51.

to procedures for awarding damages.¹²⁰ While states have flexibility to determine what kind of procedures to implement, federal constitutional law required some form of protection from excessiveness and arbitrariness.¹²¹ *Phillip Morris* acknowledged as legitimate Oregon's respect for civil jury awards, but emphasized the necessity of avoiding procedures that unnecessarily deprived a jury of proper legal guidance.¹²² The Court ultimately remanded the matter for a review of Oregon's procedures, specifically whether part of the punitive award was based on harm caused to nonparty victims.¹²³

Exxon Shipping Company v. Baker involved issues of federal maritime law, but offered direct insight into what federal constitutional limits applied to procedures governing civil jury awards.¹²⁴ *Exxon Shipping* concerned a punitive damage award that resulted from the 1989 grounding of an oil supertanker in Alaska.¹²⁵ The jury's award was based in part on evidence that eleven hours after the accident the supertanker's captain registered a .061 blood alcohol level.¹²⁶ At trial, experts predicted that at the time of the accident the captain's blood-alcohol level was three times the legal driving limit in most states.¹²⁷ Exxon disputed this evidence,¹²⁸ as well as its knowledge that the captain had relapsed after failing to complete a rehabilitation

¹²⁰ *Id.* at 352–53; *see also* *Pac. Mut. Life Ins. v. Haslip*, 499 U.S. 1, 15–22 (1991) (discussing requirement that procedures be adequate).

¹²¹ *Phillip Morris*, 549 U.S. at 357. The Court reasoned that the amount of damage should not be the result of arbitrary decision making or “a decision maker’s caprice.” *Id.* at 352; *see also id.* at 354 (referring to *Gore* and *Campbell* as addressing fundamental due process concerns about arbitrary damage awards).

¹²² *Id.* at 355.

¹²³ *Id.* at 353–54 (affirming the rule that an award of punitive damages cannot serve the purpose of punishing the defendant for harm to non-party victims).

¹²⁴ 554 U.S. 471, 506 (2008) (“One option would be to follow the states that set a hard dollar cap on punitive damages.”).

¹²⁵ *Id.* at 476–79. The approximately 900-foot tanker was carrying 53 million gallons of crude oil from the end of the Trans-Alaska Pipeline to the lower 48 states. *Id.* at 476. Before the accident, the ship’s captain, Joseph Hazelwood, set the tanker to autopilot and left the bridge to “do paperwork.” *Id.* at 477. A third mate was left alone on the bridge although protocol required two officers. *Id.* at 478. Hazelwood was the only person on the ship licensed to navigate the area where the accident occurred. *Id.* The tanker ultimately ran aground, which tore open the hull and spilled 11 million gallons of crude oil into Prince William Sound. *Id.* After the accident, Hazelwood attempted to rock the tanker off the reef upon which it had run aground, which could have caused more spillage. *Id.*

¹²⁶ *Id.* at 478. The Coast Guard performed a blood test on Hazelwood almost immediately after the accident. *Id.* Exxon also disputed the findings of these tests. *Id.*

¹²⁷ *Id.* at 478–79. The blood alcohol level was based on the amount recorded by the Coast Guard’s blood alcohol test 11 hours after the spill. *Id.* at 478. Additionally, witnesses testified that Hazelwood consumed at least 5 double vodkas before the tanker left port. *Id.* at 477.

¹²⁸ *Id.* at 478.

program for alcohol addiction.¹²⁹ Independent of the present action, the accident cost Exxon billions of dollars in cleanup efforts and civil and criminal liability.¹³⁰ In the present action, the jury awarded \$287 million in compensatory damages and \$5 billion in punitive damages.¹³¹ The Ninth Circuit reduced the jury's punitive damage award to \$2.5 billion.¹³²

Exxon Shipping recognized a long-standing tradition in the common law for individual reasonableness reviews of damage awards.¹³³ Because legislatures cannot account for variation among individual cases,¹³⁴ *Exxon Shipping* rejected any notion of a mathematical formula for fixing damage awards, regardless of whether such award constituted compensatory or punitive damages.¹³⁵ According to the Court, "there is no 'standard' tort . . . injury, making it difficult to settle upon a particular dollar figure as appropriate across the board."¹³⁶ *Exxon Shipping* held a reasonableness review of the civil jury's award under *Gore* the better framework.¹³⁷

Exxon Shipping also addressed claims that civil jury awards had become "out-of-control" or excessive,¹³⁸ as had long been argued by tort reformists. Scholars like Professor Deborah Hensler had, for decades, argued that jury awards in personal injury cases remained relatively stable.¹³⁹ Professors Neil Vidmar and Jeffery Rice

¹²⁹ *Id.* at 476–77. Hazelwood had completed a 28-day alcohol treatment program but dropped out of the follow-up program, including Alcoholics Anonymous meetings. *Id.* at 476. According to the evidence at trial, Hazelwood continued drinking after he was released from a residential treatment program. *Id.* at 476–77. This drinking allegedly occurred aboard Exxon tankers and with Exxon officials. *Id.* Exxon presented no evidence that Hazelwood had been monitored after his return to duty. *Id.* at 477.

¹³⁰ *Id.* at 479. This included a \$125 million settlement for violation of the Clean Water Act, a \$900 million consent decree that resulted from another civil action, and \$303 million in voluntary settlements with private parties. *Id.*

¹³¹ *Id.* at 480–81.

¹³² *Id.* at 481.

¹³³ *Id.* at 490. The Court rested its authority on its role as the common law court of last review, albeit one "faced with a perceived defect in a common law remedy." *Id.* at 507.

¹³⁴ *Id.* at 506 (also discussing the difficulty for a legislature to index an amount for inflation and revisit that provision whenever there seemed to be a need for further tinkering). In the Court's view, the more promising alternative was to leave the effects of inflation to the jury or judge who assessed the value of actual loss. *Id.*; see also Baldus et al., *supra* note 25, at 1169–70.

¹³⁵ *Exxon Shipping*, 554 U.S. at 506.

¹³⁶ *Id.*; see also *id.* at 503 ("[J]ustice would surely bar penalties that reasonable people would think excessive [or arbitrary] for the harm caused in the circumstances.").

¹³⁷ *Id.* at 506.

¹³⁸ *Id.* at 497–99.

¹³⁹ See Hensler, *supra* note 12, at 486–95 (discussing relative stability of jury awards in personal injury cases from 1960–1979 and concluding that once difference in the type of case has been accounted for, juries have properly awarded higher damages based on the seriousness of the injury).

also concluded that juries provide more stable estimates of noneconomic damages than arbitrators.¹⁴⁰ The Court found that overall civil jury damage awards demonstrated restraint.¹⁴¹ While civil jury awards had grown over time,¹⁴² “by most accounts the median ratio of punitive to compensatory awards ha[d] remained less than [1-to-1].”¹⁴³ No data substantiated a marked increase in the percentages of awards.¹⁴⁴ The culprit was not the amount of awards, but the unpredictability and inconsistency of awards.¹⁴⁵ In cases of such outliers, the award must meet the due process standard for reasonableness.¹⁴⁶

As a method of tort reform, compensatory damage caps only affect those who have suffered more damage at the hands of a tortfeasor. Yeazell argued the real aim of most state law tort reforms was not *frivolous* lawsuits, but *meritorious* lawsuits with “very high damages.”¹⁴⁷ Baldus, MacQueen, and Woodworth agree and argue caps do not address the equitable relationship between the injury and the award.¹⁴⁸ Caps also ignore the sufficiency of evidence presented to the jury on compensatory damages.¹⁴⁹ In most states, application of a compensatory damage cap is automatic and mechanistic.¹⁵⁰ There is no consideration of the nature of the injury; the degree or

¹⁴⁰ See Neil Vidmar & Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 IOWA L. REV. 883, 884 (1993) (noting that personal injury plaintiffs win only one-third to one-fifth of jury trials).

¹⁴¹ *Exxon Shipping*, 554 U.S. at 497–98 (surveying literature and finding no evidence of “mass-produced runaway awards” and noting the lack of data to substantiate claims of a “marked increase[s] in the percentage of cases with punitive awards over the past several decades”).

¹⁴² *Id.* at 497.

¹⁴³ *Id.* at 497–98; see also Hensler, *supra* note 12, at 493 (describing jury awards over three categories of personal injury cases: routine personal injuries, higher stakes torts, and mass latent torts).

¹⁴⁴ *Exxon Shipping*, 554 U.S. at 498; see also Hensler, *supra* note 12, at 491 (noting that for higher stakes torts, such as medical malpractice cases, the quality of litigation has increased substantially which may have led to greater success in the courtroom).

¹⁴⁵ See *Exxon Shipping*, 554 U.S. at 500 (describing the spread between high and low individual punitive awards as unacceptable: “the spread is great, and the outlier cases subject defendants to punitive damages that dwarf the corresponding compensatories”); see also Hensler, *supra* note 12, at 495 (noting that for medical malpractice cases, the injuries are more serious and also noting that defendants tend to defend medical malpractice cases more than routine torts, which Hensler describes as automobile accidents).

¹⁴⁶ See *Exxon Shipping*, 554 U.S. at 501 (describing the reasonableness test as the standard that every award must pass).

¹⁴⁷ Yeazell, *supra* note 10, at 1786 (noting that fewer than 10% of judgments were in amounts over \$1 million).

¹⁴⁸ Baldus et al., *supra* note 25, at 1122 (arguing that caps only address allegedly excessive awards but not inadequate awards).

¹⁴⁹ See Murphy, *supra* note 9, at 407 (arguing that because caps apply regardless of the evidence, “the legislature should be viewed as second-guessing jury decisions”).

¹⁵⁰ See *infra* notes 174–92 and accompanying text.

length of pain, suffering, disfigurement, or mental anguish experienced by the injured party; or the injured party's age or other personal characteristics that directly relate to the length or amount of harm.¹⁵¹ Except in Massachusetts, there is no consideration of whether application of the cap is just or fair to the plaintiff.¹⁵² Thus, in all cap regimes but one, the compensatory damage award fails to redress actual or concrete losses even where a party successfully proves that damages exceed the cap.¹⁵³

Despite the existence of compensatory damage caps as a method of tort reform, the Court's punitive damage jurisprudence presumes that compensatory damage awards fully compensate the plaintiff.¹⁵⁴ This false presumption constitutes a fundamental flaw in the *Gore* punitive damages analysis, at least in states that mandate capped compensation.¹⁵⁵ The application of a cap does not depend on the facts and circumstances of an individual case.¹⁵⁶ An impermissible presumption of excessiveness applies to all awards over the cap.¹⁵⁷ Presumably, all awards under the cap are reasonable.¹⁵⁸

Exxon Shipping overtly rejected the major assumption justifying the existence of most caps and cautioned that even if excessiveness existed, capped compensation schemes constituted an unwise remedy.¹⁵⁹ Despite these warnings, states have continued to impose and uphold caps.¹⁶⁰

Next, this Article discusses compensatory damage caps and state constitutional civil jury trial litigation on this issue. Part II argues that caps fundamentally flaw the assumptions upon which *Gore* relies. Part II also demonstrates that capped compensation also caps the *Gore* punitive damage analysis. The effect of caps on the *Gore* punitive damage analysis has been largely ignored by current scholarship examining *Gore*, which is surprising considering *Gore*'s focus on the individual facts of a case.

¹⁵¹ See *infra* note 182 and accompanying text.

¹⁵² MASS. GEN. LAWS ch. 231, § 60H (2015).

¹⁵³ See Yeazell, *supra* note 10, at 1784 (arguing that the political narrative of tort reform was a proxy for an unspoken target—civil jury trials); see also Suja A. Thomas, *Blackstone's Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States*, 55 WM. & MARY L. REV. 1195, 1235–37 (2014) (discussing shift of power from civil juries to legislatures, which has effectively taken “the jury completely out of the damages determination”).

¹⁵⁴ See 2 AM. LAW INST., ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: REPORTERS' STUDY 258 (1991) (“[T]he compensatory award in a *successful* case should be the starting point in calculating the punitive award.”) (emphasis added).

¹⁵⁵ *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 507 (2008) (“[T]he potential relevance of the ratio between compensatory and punitive damages is indisputable, being a central feature in our due process analysis.”).

¹⁵⁶ See Murphy, *supra* note 9, at 350.

¹⁵⁷ *Id.* at 347.

¹⁵⁸ *Id.* at 350 (questioning whether a legislature may cap compensatory damages); see also *id.* at 382 n.162.

¹⁵⁹ *Exxon Shipping*, 554 U.S. at 502.

¹⁶⁰ See *infra* notes 174–92 and accompanying text.

II. STATE LAW COMPENSATORY DAMAGE CAPS

Compensatory damages result from an alleged and proven injury.¹⁶¹ More specifically, compensatory damages are “awarded to a person as compensation, indemnity or restitution for harm.”¹⁶² When awarded, compensatory damages should be more or less commensurate with the injury suffered.¹⁶³ Compensatory damages can contain both an economic loss and a noneconomic loss component.¹⁶⁴ The economic loss component includes medical expenses, lost earnings, and other objectively verifiable monetary losses.¹⁶⁵ The noneconomic loss component includes injuries related to pain, suffering, mental anguish and other emotional distresses, disfigurement, and the loss of consortium or capacity to enjoy life.¹⁶⁶

Compensatory damages predate the founding and are an American import of common law origins.¹⁶⁷ *Robinson v. Harman*,¹⁶⁸ an English common law case involving contracts, appears to be the first to articulate the principle of compensatory damages.¹⁶⁹ *Robinson* established that “where a party sustains a loss by reason of breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.”¹⁷⁰ Thus, at its origins compensatory damages were specifically designed to put a party in the same position before some harm or wrong occurred.

Until recently, an enduring principle was that the amount of compensatory damages necessarily depended on the specific circumstances of an individual case.¹⁷¹ In the mid-1970s, some states began imposing mandatory caps against compensatory damages in certain categories of common law–based tort cases.¹⁷² These states argued that “runaway” civil juries were the cause of a nationwide medical malpractice insurance

¹⁶¹ *Birdsall v. Coolidge*, 93 U.S. 64, 64 (1876).

¹⁶² RESTATEMENT (SECOND) OF TORTS § 903 (1979).

¹⁶³ *Birdsall*, 93 U.S. at 64.

¹⁶⁴ FISCHER, *supra* note 19, § 6.5, at 36–37.

¹⁶⁵ *Id.* at 36. Some states also imposed caps on punitive damage awards. *See id.* at 37.

¹⁶⁶ *Id.* at 36–37.

¹⁶⁷ *See* Jeff B. Allison, *First Amendment Claims Under the Prison Litigation Reform Act: A Mental or Emotional Injury?*, 74 U. CIN. L. REV. 1067, 1085 (2006).

¹⁶⁸ (1848) 1 Ex. 850.

¹⁶⁹ *See* David Campbell, *A Relational Critique of the Third Restatement of Restitution* § 39, 68 WASH. & LEE L. REV. 1063, 1097–98 (2011) (citing *Robinson*, 1 Ex. at 855); *see also* OXFORD PRINCIPLES OF ENGLISH LAW: ENGLISH PRIVATE LAW 1260 (Andrew Burrows ed., 3d ed. 2013).

¹⁷⁰ Campbell, *supra* note 169, at 1097–98 (quoting *Robinson*, 1 Ex. at 855).

¹⁷¹ Jill Wieber Lens, *Procedural Due Process and Predictable Punitive Damages Awards*, 2012 BYU L. REV. 1, 39 (2012).

¹⁷² *See, e.g.,* Anderson, *supra* note 13, at 350 (describing California’s passage of a medical malpractice liability compensatory damage cap in 1975 as occurring during a “tidal wave of malpractice litigation”).

crisis.¹⁷³ Some compensatory damage caps applied broadly to all tort actions.¹⁷⁴ Other caps applied narrowly to wrongful death¹⁷⁵ or medical malpractice cases. Additionally, some states applied the cap only against noneconomic damages.¹⁷⁶ Other states

¹⁷³ See generally Barbour, *supra* note 9. But see James L. Wright & M. Matthew Williams, *Remember the Alamo: The Seventh Amendment of the United States Constitution, the Doctrine of Incorporation, and State Caps on Jury Awards*, 45 S. TEX. L. REV. 449, 461 (2004) (discussing reports by Standard & Poor's and the Federal National Practitioners Data Bank, both of which found that the annual amount of medical malpractice payouts remained relatively flat from 1993 to 2002). Additionally, a 2003 study for the United States General Accounting Office opined that increased medical malpractice premium rates were caused in part by the failure of insurance companies to increase rates during periods of high investment return. *Id.* at 463–64 (citing U.S. GEN. ACCOUNTING OFFICE, GAO-03-792, MEDICAL MALPRACTICE INSURANCE (2003)); see also Hensler, *supra* note 12, at 481 (arguing that, based on data from the Administrative Office of the U.S. Courts, the National Center for State Courts, and Institute for Civil Justice, “the total tort caseload has grown very little” in the years before 1987).

¹⁷⁴ See generally IDAHO CODE ANN. § 6-1603 (West 2015) (imposing \$250,000 cap against noneconomic damages); 735 ILL. COMP. STAT. ANN. 5/2-1115.1 (West 2007) (imposing \$500,000 cap against noneconomic damages), *declared unconstitutional* by *Best v. Taylor Mach. Works*, 689 N.E. 2d 1057 (Ill. 1997); KAN. STAT. ANN. § 60-19a02 (2014) (imposing \$250,000 to \$350,000 cap against noneconomic damages); OKLA. STAT. ANN. tit. 23 § 61.2 (West 2015) (imposing \$350,000 cap against noneconomic damages); TENN. CODE ANN. § 29-39-102 (2012) (imposing \$750,000 to \$1 million cap against noneconomic damages).

¹⁷⁵ See ME. REV. STAT. tit. 18-A, § 2-804 (2009) (imposing \$500,000 noneconomic damage cap).

¹⁷⁶ See, e.g., ALASKA STAT. § 09.55.549 (2015) (imposing \$250,000 and \$400,000 cap); CAL. CIV. CODE § 3333.2 (West 2015) (imposing \$250,000 cap); COLO. REV. STAT. § 13-64-302 (2015) (imposing \$1 million cap against past and future damages and also imposing \$250,000 noneconomic damage cap, which was raised to \$350,000 in 2003); FLA. STAT. § 766.118 (2011) (imposing \$150,000 to \$1.5 million cap in cases resulting in injury and death), *declared unconstitutional as applied in wrongful death cases* by *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014); GA. CODE ANN. § 51-13-1(b) (2015) (imposing \$350,000 cap but raised to \$700,000 when multiple institutions involved), *declared unconstitutional* by *Atlantic Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010); MD. CODE ANN. CTS. & JUD. PROC. § 3-2A-09 (West 2015) (imposing \$650,000 cap when injury or death results); MASS. GEN. LAWS ch. 231, § 60H (2015) (imposing \$500,000 cap unless the jury finds the cap would “deprive the plaintiff of just compensation”); MICH. COMP. LAWS ANN. § 600.1483 (West 2013) (imposing \$280,000 to \$500,000 cap); MO. REV. STAT. § 538.210 (2015) (imposing \$350,000 cap), *declared unconstitutional* by *Watts v. Cox. Med. Ctr.*, 576 S.W.3d 633 (Mo. 2012); MONT. CODE ANN. § 25-9-411 (2015) (imposing \$250,000 cap); NEB. REV. STAT. § 44-2825 (2015) (imposing \$250,000 to \$2,250,000 cap); NEV. REV. STAT. § 41A.035 (2015) (imposing \$350,000 cap); N.C. GEN. STAT. § 90-21.19 (2015) (imposing \$500,000 cap); N.D. CENT. CODE § 32-42-02 (2015) (imposing \$500,000 cap); OHIO REV. CODE ANN. § 2323.43 (West 2015) (imposing \$250,000 to \$1 million cap); S.C. CODE ANN. § 15-32-220 (2015) (imposing \$350,000 cap); TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (West 2015) (imposing \$250,000 cap but raised to \$500,000 when multiple institutions involved); UTAH CODE ANN. § 78B-3-410 (West 2015) (imposing \$250,000 to \$450,000 cap); W. VA. CODE § 55-7B-8 (2015) (imposing \$250,000

applied the cap against both economic and noneconomic damages.¹⁷⁷ Not all states imposed limits on recovery in personal injury cases¹⁷⁸ and others refused to apply the cap where injurious acts were reckless, intentional, or illegal.¹⁷⁹ A few states prohibit informing the jury about the cap.¹⁸⁰ Only one state, Massachusetts, allows the jury to ignore the cap if its imposition would be unfair to the plaintiff.¹⁸¹

The application of a compensatory damage cap does not depend on the specific circumstances of an individual case.¹⁸² Moreover, the assertion that caps constitute a reasonable response to excessive civil jury awards is questionable. Among cap regimes, what constitutes an “excessive” civil jury award varies widely, approximately between \$250,000 and \$3 million.¹⁸³ The majority of states, like Idaho, which upheld its cap, and Missouri, which recently struck it down, fix the cap between \$250,000 and \$350,000.¹⁸⁴ A few caps are fixed between \$500,000 and

to \$500,000 cap); WIS. STAT. § 893.55(4)(d)(1) (2008) (imposing \$350,000 cap), *declared unconstitutional by* *Ferdon ex rel. Petrucelli v. Wisconsin Patients Comp. Fund*, 701 N.W.2d 440 (Wis. 2005) (no litigation on subsequently enacted \$750,000 noneconomic damage cap).

¹⁷⁷ See IND. CODE § 34-18-14-3 (West 2015) (imposing \$500,000 to \$1,125,000 cap where healthcare provider is liable for \$250,000 and remainder paid from compensation fund); LA. STAT. ANN. § 40:1299.42 (West 2015) (imposing \$500,000 cap where healthcare provider is liable for \$100,000 and remainder paid from compensation fund); N.M. STAT. ANN. § 41-5-6 (2015) (imposing \$600,000 cap when injury or death results; healthcare provider is liable for \$200,000 and remainder paid from compensation fund); S.D. CODIFIED LAWS § 21-3-11 (2015) (imposing \$500,000 cap); VA. CODE ANN. § 8.01-581.15 (2011) (imposing \$3 million cap).

¹⁷⁸ States that have not imposed caps on tort damage awards include Arizona, Arkansas, Connecticut, Delaware, Iowa, Kentucky, Maine, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont. The District of Columbia also has not imposed a cap.

¹⁷⁹ See ALASKA STAT. ANN. § 09.55.549 (2015); IDAHO CODE ANN. § 6-1603 (West 2015); N.C. GEN. STAT. ANN. § 90-21.19 (West 2015); OKLA. STAT. ANN. tit. 23 § 61.2 (West 2015); S.C. CODE ANN. § 15-32-220 (2015); TENN. CODE ANN. § 29-39-102 (2012).

¹⁸⁰ See COLO. REV. STAT. § 13-64-302 (2015); IDAHO CODE ANN. § 6-1603 (West 2015); KAN. STAT. ANN. § 60-19a02 (2015); MD. CODE ANN. CTS. & JUD. PROC. § 3-2A-09 (West 2015); MO. REV. STAT. § 538.210 (2015), *declared unconstitutional by* *Watts v. Cox. Med. Ctr.*, 576 S.W.3d 633 (Mo. 2012); MONT. CODE ANN. § 25-9-411 (2015); N.C. GEN. STAT. ANN. § 90-21.19 (West 2015); N.D. CENT. CODE § 32-42-02 (2015); N.M. STAT. ANN. § 41-5-6 (2015); OHIO REV. CODE ANN. § 2323.43 (West 2015); OKLA. STAT. ANN. tit. 23 § 61.2 (West 2015); TENN. CODE ANN. § 29-39-102 (2012); *see also* Murphy, *supra* note 9, at 401 (arguing that such provisions misinform the jury about the governing law on compensation).

¹⁸¹ MASS. GEN. LAWS ch. 231, § 60H (2015).

¹⁸² See *supra* notes 173–77 (discussing general applicability to all tort actions).

¹⁸³ See *infra* notes 184–91 and accompanying text.

¹⁸⁴ See, e.g., CAL. CIV. CODE § 3333.2 (West 2015) (imposing \$250,000 cap against noneconomic damages in medical malpractice cases); COLO. REV. STAT. § 13-64-302 (2015) (imposing \$250,000 noneconomic damage cap in medical malpractice cases, which was raised to \$350,000 in 2003); GA. CODE ANN. § 51-13-1(b), (d) (2015) (imposing \$350,000 noneconomic damage cap in medical malpractice cases but raised to \$700,000 when multiple

\$750,000.¹⁸⁵ Washington's cap, which was also struck down, designated a formula based on the plaintiff's age.¹⁸⁶ Other states designate a range for their cap,¹⁸⁷ but

institutions are involved), *declared unconstitutional* by *Atlantic Oculoplastic Surgery, P.C. v. Nestlehurst*, 691 S.E.2d 218 (Ga. 2010); IDAHO CODE ANN. § 6-1603 (West 2015) (imposing \$250,000 noneconomic damage cap in all personal injury cases); KAN. STAT. ANN. § 60-19a02 (2015) (imposing \$250,000 noneconomic damage cap in all personal injury cases); MO. REV. STAT. § 538.210 (2015) (imposing \$350,000 noneconomic damage cap in medical malpractice cases), *declared unconstitutional* by *Watts v. Cox. Med. Ctr.*, 576 S.W.3d 633 (Mo. 2012); MONT. CODE ANN. § 25-9-411 (2015) (imposing \$250,000 noneconomic damage cap in medical malpractice cases); NEB. REV. STAT. § 44-2825 (2015) (imposing \$250,000 to \$2,250,000 noneconomic damage cap in medical malpractice cases), NEV. REV. STAT. § 41A.035 (2015) (imposing \$350,000 cap); N.D. CENT. CODE § 32-42-02 (2015) (imposing \$500,000 noneconomic damage cap in medical malpractice cases); OKLA. STAT. tit. 23 § 61.2 (West 2015) (imposing \$350,000 cap against noneconomic damages in all tort cases); S.C. CODE ANN. § 15-32-220 (2015) (imposing \$350,000 noneconomic damage cap in medical malpractice cases); TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (West 2015) (imposing \$250,000 noneconomic damage cap in medical malpractice cases but raised to \$500,000 when multiple institutions are involved); WIS. STAT. § 893.55(4)(d)(1) (2008) (imposing \$350,000 noneconomic damage cap in medical malpractice cases), *declared unconstitutional* by *Ferdon ex rel. Petrucelli v. Wisconsin Patients Comp. Fund*, 701 N.W.2d 240 (Wis. 2005).

¹⁸⁵ 735 ILL. COMP. STAT. ANN. 5/2-1115.1 (West 2007) (imposing \$500,000 noneconomic damage cap in all personal injury cases), *declared unconstitutional* by *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895 (Ill. 2010); LA. STAT. ANN. § 40:1299.42(B)(1) (West 2015) (imposing \$500,000 total damage cap in medical malpractice cases); ME. REV. STAT. tit. 18-A, § 2-804 (2009) (imposing \$500,000 noneconomic damage cap in wrongful death cases); MD. CODE ANN. CTS. & JUD. PROC. § 3-2A-09 (West 2015) (imposing \$650,000 noneconomic damage cap in medical malpractice cases where injury or death results but providing that this amount "shall increase by \$15,000 on January 1 of each year beginning January 1, 2009"); MASS. GEN. LAWS ch. 231, § 60H (2015) (imposing \$500,000 noneconomic damage cap in medical malpractice cases *unless the jury determines the cap "would deprive the plaintiff of just compensation"*) (emphasis added); N.M. STAT. ANN. § 41-5-6 (2015) (imposing \$600,000 damage cap in medical malpractice cases when injury or death results with provision for increase every third year beginning with January 1, 2014); N.C. GEN. STAT. § 90-21.19 (2015) (imposing \$500,000 noneconomic damage cap in medical malpractice cases but providing formula for increase every third year); S.D. CODIFIED LAWS § 21-3-11 (2015) (imposing \$500,000 total damage cap in medical malpractice cases).

¹⁸⁶ WASH. REV. CODE § 4.56.250 (1986) (imposing cap in all personal injury cases), *declared unconstitutional* by *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989).

¹⁸⁷ See generally ALASKA STAT. § 09.55.549 (2015) (imposing noneconomic damage cap between \$250,000 and \$400,000 in medical malpractice cases); COLO. REV. STAT. § 13-64-302 (2015) (imposing \$1 million cap against past and future damages); MICH. COMP. LAWS ANN. § 600.1483 (West 2013) (imposing \$280,000 to \$500,000 noneconomic damage cap in medical malpractice cases); OHIO REV. CODE ANN. § 2323.43 (West 2015) (imposing noneconomic damage cap between \$250,000 and \$1 million in medical malpractice cases); UTAH CODE ANN. § 78B-3-410 (West 2015) (imposing \$250,000 to \$450,000 noneconomic damage cap in medical malpractice cases); W. VA. CODE ANN. § 55-7B-8 (West 2015) (imposing \$250,000 to \$500,000 noneconomic damage cap in medical malpractice cases).

only a few allow damages above \$1 million.¹⁸⁸ The broadest cap range is Florida at \$150,000 to \$1.5 million.¹⁸⁹ At an amount under \$2 million, the highest cap range is Tennessee at \$750,000 to \$1 million.¹⁹⁰ Virginia's \$3 million cap constitutes the maximum among states, but Virginia also previously capped damages at \$750,000.¹⁹¹ A few states provide annual increases to the cap,¹⁹² but most do not.

Because the application of a compensatory damage cap is not predicated upon a finding that a civil jury's damage award was excessive, whether compensatory damage caps violate state civil jury rights remains at issue. Yeazell describes the civil jury as a unique institution.¹⁹³ This view of the civil jury is reflected in all but a few state constitutions, as well as the Federal Constitution, which guarantee civil jury trials in common law cases.¹⁹⁴ By far, most state constitutions establish an *in-violate* civil jury trial right, as do Washington, Idaho, and Missouri.¹⁹⁵ This term is defined as "free from change or blemish: PURE, UNBROKEN."¹⁹⁶ A few state civil

¹⁸⁸ See IND. CODE § 34-18-14-3 (2015) (imposing noneconomic damage cap between \$500,000 and \$1,125,000 in personal injury cases); S.C. CODE ANN. § 15-32-220 (2015) (imposing \$350,000 to \$1,050,000 cap in personal injury cases that involve medical malpractice).

¹⁸⁹ FLA. STAT. § 766.118 (2011) (imposing cap against noneconomic damages in medical malpractice cases resulting in personal injury or death), *overturned as applied to wrongful death cases by Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014).

¹⁹⁰ TENN. CODE ANN. § 29-39-102 (2012).

¹⁹¹ VA. CODE ANN. § 8.01-581.15 (2011).

¹⁹² See COLO. REV. STAT. § 13-64-302 (2015); IDAHO CODE ANN. § 6-1603 (West 2015); 735 ILL. COMP. STAT. ANN. 5/2-1115.1 (2007); MD. CODE ANN. CTS. & JUD. PROC. § 3-2A-09 (West 2015); MICH. COMP. LAWS ANN. § 600.1483 (West 2013); N.C. GEN. STAT. § 90-21.19 (2015); S.C. CODE ANN. § 15-32-220 (2015); UTAH CODE ANN. § 78B-3-410 (West 2015); W. VA. CODE ANN. § 55-7B-8 (2015); WIS. STAT. § 893.55(4)(d)(1) (2001).

¹⁹³ See generally Yeazell, *supra* note 10, at 1783 (citing Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 667-705 (1973)).

¹⁹⁴ See *Motz v. Jammarron*, 676 P.2d 1211, 1213 (Colo. App. 1983) (acknowledging that the Colorado Constitution does not entitle litigants to a civil jury as a matter of right); *Tellis v. Lincoln Par. Police Jury*, 916 So.2d 1248, 1250 (La. Ct. App. 2005) (acknowledging that the Louisiana Constitution does not guarantee a right to a civil jury).

¹⁹⁵ See ALA. CONST. art. 1, § 11; ARIZ. CONST. art. 2, § 23; ARK. CONST. art. 2, § 7; CAL. CONST. art. 1, § 16; CONN. CONST. art. 1, § 19; FLA. CONST. art. 1, § 22; GA. CONST. art. 1, § 1, para. XI; IDAHO CONST. art. 1, § 7; ILL. CONST. art. 1, § 13; IND. CONST. art. 1, § 20; KAN. CONST. BILL OF RIGHTS, § 5; KY. CONST. BILL OF RIGHTS, § 7; MINN. CONST. art. 1, § 4; MISS. CONST. art. 3, § 31; MO. CONST. art. 1, § 22(a); MONT. CONST. art. 2, § 26; NEB. CONST. art. 1, § 6; NEV. CONST. art. 1, § 3; N.J. CONST. art. 1, para. 9; N.M. CONST. art. 2, § 12; N.Y. CONST. art. 1, § 2; N.D. CONST. art. 1, § 13; OHIO CONST. art. 1, § 5; OKLA. CONST. art. 2, § 19; OR. CONST. art. 1, § 17; PA. CONST. art. 1, § 6; R.I. CONST. art. 1, § 15; S.D. CONST. art. 6, § 6; TENN. CONST. art. 1, § 6; TEX. CONST. art. 1, § 15; WASH. CONST. art. 1, § 21; WIS. CONST. art. 1, § 5. *But see* COLO. CONST. art. 2, § 23 (only referring to criminal cases).

¹⁹⁶ *Inviolat*e, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1190 (Phillip Babcock Grove ed., 1993).

jury trial clauses mirror the Seventh Amendment,¹⁹⁷ which provides: “In Suits at common law . . . the right of trial by jury shall be *preserved*.”¹⁹⁸ A few others states, like Virginia, declare a *sacred* civil jury trial right.¹⁹⁹ Other state civil jury trial clauses are best described as anomalies.²⁰⁰

Under the Federal Constitution, “[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in . . . history and jurisprudence that any seeming curtailment of the right . . . [is] scrutinized with the utmost care.”²⁰¹ Whether this rule applies to state civil jury trial clauses is unclear. Nevertheless, for colonial constitutions that adopt the common law, any change that alters the common law also alters the state constitution.²⁰² But the common law was flexible and adaptable to varying conditions.²⁰³ The extent of such flexibility and adaptability constitutes a major conflict among states, which is demonstrated by two state supreme courts that reached opposing decisions in 1989 on the constitutionality of compensatory damage caps: Virginia, in *Etheridge v. Medical Center Hospital*,²⁰⁴ and Washington, in *Sofie v. Fibreboard Corporation*.²⁰⁵

Etheridge and *Sofie* embody the fluctuating level of scrutiny among state supreme courts when examining state civil jury trial rights. In *Etheridge* a civil jury’s award of \$2,750,000 was reduced pursuant to section 8.01-581.15 of the Virginia Code.²⁰⁶ At the time, *total* damages in medical malpractice cases were capped at

¹⁹⁷ See generally HAW. CONST. art. 1, § 13; MICH. CONST. art. 1, § 14; W. VA. CONST. art. 3, § 13.

¹⁹⁸ U.S. CONST. amend. VII (emphasis added); see also *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432–33 (1996) (identifying and discussing the Seventh Amendment’s Civil Jury Trial and Reexamination Clauses).

¹⁹⁹ E.g., MASS. CONST. pt. 1, art. 15; N.H. CONST. pt. 1, art. 20; VT. CONST. ch. 1, art. 12; VA. CONST. art. 1, § 11.

²⁰⁰ See DEL. CONST. art. 1, § 4 (“Trial by jury shall be as heretofore.”); ME. CONST. art. 1, § 20 (“In all civil suits, and in all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced”); MD. CONST. DECLARATION OF RIGHTS, art. 23 (inviolably preserving civil jury trial right); N.C. CONST. art. 1, § 25 (preserving civil jury trial right as sacred and inviolate); S.C. CONST. art. 1, § 14 (“The right of trial by jury shall be preserved inviolate.”). But see LA. CONST. art. 1, § 16 (referring only to criminal jury trial right).

²⁰¹ *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

²⁰² *Id.* at 487; see also *id.* at 490–91 (Stone, J., dissenting) (explaining that encroachments on the jury trial right that were impermissible in the common law would also be impermissible by the Seventh Amendment).

²⁰³ *Id.* at 487; see also *id.* at 492 (Stone, J., dissenting) (explaining that the common law did not prevent development of novel procedures unless such procedures impaired the jury’s function to decide issues of fact).

²⁰⁴ 376 S.E.2d 525 (Va. 1989).

²⁰⁵ 771 P.2d 711 (Wash. 1989).

²⁰⁶ *Etheridge*, 376 S.E.2d at 529. Wilson had already expended more than \$300,000 for care and treatment by the time of trial. *Id.* These expenditures were expected to last the

\$750,000.²⁰⁷ Richie Wilson, the plaintiff, was a “normal, healthy,” thirty-five-year-old married woman and mother of three children.²⁰⁸ Wilson underwent surgery to restore her deteriorating jaw bone.²⁰⁹ The surgeon removed and reshaped long portions of her rib bones and grafted them into her jaw.²¹⁰ The surgery left Wilson brain damaged, paralyzed, “confined to a wheelchair, and unable to care for herself or her children.”²¹¹ Her condition was described as permanent.²¹²

The Virginia Supreme Court held section 8.01-581.15 did “nothing more than establish the outer limits” of recovery.²¹³ *Etheridge* held legislative actions presumptively reasonable unless “plainly repugnant to some provision of the state or Federal Constitution.”²¹⁴ In enacting the cap, Virginia’s General Assembly relied on its own 1975 study that demonstrated medical malpractice insurance rates had increased nationwide more than 1000% since 1960.²¹⁵ According to Virginia’s report, the increase resulted from the number and severity of medical malpractice claims.²¹⁶ *Etheridge* apparently accepted the claim that a correlation existed between nationwide increases in medical malpractice insurance premiums and the availability of medical malpractice insurance in Virginia.²¹⁷ *Etheridge* also accepted the General Assembly’s conclusion that it had become too expensive to purchase medical malpractice insurance in Virginia,²¹⁸ which threatened the availability of medical

remainder of Wilson’s life. *Id.* (noting life expectancy of 39.9 years). Before the accident, Wilson earned approximately \$10,000 per year as a nurse. *Id.* Wilson’s economic losses were alleged to amount to \$1.9 million. *Id.* Virginia’s cap currently sets a damage range of up to \$3 million beginning on or after July 1, 2013. *See* VA. CODE ANN. § 8.01-581.15 (2015).

²⁰⁷ *Etheridge*, 376 S.E.2d at 527.

²⁰⁸ *Id.* at 526.

²⁰⁹ *Id.*

²¹⁰ *Id.* A general surgeon, Dr. Trower, removed Wilson’s ribs. *Id.* An oral surgeon grafted the reshaped rib bone into her jaw. *Id.* The jury found both Dr. Trower and the hospital negligent and held that such negligence caused Wilson’s injuries. *Id.*

²¹¹ *Id.* at 527. Wilson’s brain damage severely affected her memory and intelligence. *Id.* She also suffered paralysis on her left side. *Id.*

²¹² *Id.*

²¹³ *Id.* at 529.

²¹⁴ *Id.* at 528 (quoting *Blue Cross v. Commonwealth*, 269 S.E.2d 827, 832 (Va. 1980)). Due to such deference, all doubt must be resolved in favor of the validity of legislative action. *Id.*

²¹⁵ *Id.* at 527–28. The study was prepared by the Virginia State Corporation Commission’s Bureau of Insurance, which reported that since 1960 medical malpractice insurance rates had increased nationwide more than 1000%. *Id.* at 527. This increase was alleged to have resulted from a rise in the number and severity of medical malpractice claims, of which 90% originated after 1965. *Id.*

²¹⁶ *Id.* at 527.

²¹⁷ *Id.* at 527, 533. The study also concluded that the increase in insurance rates directly and substantially caused providers to cease providing services in Virginia, which also negatively affected the health, safety, and welfare of state citizens. *Id.* at 527–28.

²¹⁸ *Id.* at 527, 533.

care services within the state.²¹⁹ Ultimately, *Etheridge* afforded great deference to Virginia's judgment that its cap should reflect what medical malpractice insurers were willing to insure (presumably at the time \$750,000 for both economic and non-economic damages).²²⁰

Professor Colleen Murphy, who writes extensively on the conflict between legislative authority and civil jury trial rights, disagrees with *Etheridge* and warns that imposition of compensatory damage caps renders the jury's computation of compensatory damages illusory.²²¹ *Etheridge* recognized broad legislative authority to alter the nature and scope of the civil jury trial right as it existed in the common law.²²² *Etheridge* briefly examined the scope of the *sacred* civil jury trial right contained in Article I, section 11 of the Virginia Constitution.²²³ *Etheridge* reasoned that when Virginia's Constitution was adopted in 1776,²²⁴ twenty years before ratification of the Seventh Amendment Civil Jury Trial Clause, the cause of action for medical malpractice was a legislatively created tort rather than one based on the common law.²²⁵ As such, a Virginian jury's constitutionally mandated role in medical malpractice cases was fulfilled once disputed facts were resolved and damages were assessed (even if the latter was unenforceable).²²⁶

Professor Charles McCormick, who authored the 1935 classic *Handbook on the Law of Damages*, would perhaps agree with Murphy. McCormick opined that "from the beginning of trial by jury," the amount of damages were "a 'fact' to be found by the jur[y]." ²²⁷ Yet *Etheridge* maintains that for Virginian medical malpractice actions, the jury's fact-finding function only extended to an assessment of damages.²²⁸ In effect, the law could ultimately determine the limits of recovery.²²⁹ In this scenario, Virginia's cap was only a mere dictation of the "outer limits," or the ceiling, of a jury's award.²³⁰ The trial court's reduction of damages was the mere application of the law

²¹⁹ *Id.* at 527–28, 533.

²²⁰ *Id.* at 533. According to the General Assembly, it became increasingly difficult for Virginian healthcare providers to obtain medical malpractice insurance in excess of \$750,000. *Id.* at 527. The court accepted this finding without support. *Id.* at 533.

²²¹ Murphy, *supra* note 9, at 404 (arguing against the disingenuousness of claiming compensatory damage caps do not change the functioning of the jury and maintaining that caps "render[] the jury's decision about compensation illusory").

²²² See *Etheridge*, 376 S.E.2d at 529, 532.

²²³ *Id.* at 528–29.

²²⁴ *Id.*

²²⁵ *Id.* at 529.

²²⁶ *Id.* *Etheridge* acknowledges that the "jury's fact-finding function extend[ed] to the assessment of damages," but described damages as a matter of law not fact. *Id.* (citations omitted).

²²⁷ CHARLES T. MCCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* 24 (1935).

²²⁸ *Etheridge*, 376 S.E.2d at 528–29.

²²⁹ *Id.*

²³⁰ *Id.* at 529.

to the facts.²³¹ *Etheridge* also disagreed with Seventh Amendment jurisprudence that designated the amount of damages in personal injury cases as an issue of fact within the province of the jury.²³²

Professor John Langbein has found that in the common law, the link between trial and jury was so close that there was “no such thing as nonjury trial[s]” whether by legislative action or otherwise.²³³ *Etheridge* designated the “‘case stated’ procedure” the best portrayal of the common law role of the civil jury during the latter part of the eighteenth century when Virginia’s Constitution was adopted.²³⁴ According to *Etheridge*, the “case stated” procedure allegedly demonstrated that “the common law never recognized a right to a full recovery in tort,”²³⁵ but was designed specifically for the purpose of “bypass[ing] the jury when only *undisputed* facts remained.”²³⁶ In a trial that resulted in a “case stated,” the civil “jury’s role was reduced to a mere formality” and was limited to resolving any “factual issues that arose.”²³⁷ In such cases, the parties were entitled to a jury’s assessment of damages, but not the legal effect or *enforcement* of the jury’s award.²³⁸ *Etheridge* did not discuss common law procedures in the late eighteenth century that applied when a case presented *disputed* issues of fact.²³⁹

The Washington Supreme Court’s opinion in *Sofie* appears to align more closely with Murphy, McCormack, and Langbein’s views of the nature and scope of the

²³¹ *Id.* (noting that the trial court applied the cap “after the jury . . . fulfilled its fact-finding function”).

²³² See *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) (noting that “the extent of the injury by an assessment of damages” is a question of fact for the jury).

²³³ John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 527 (2012).

²³⁴ *Etheridge*, 376 S.E.2d at 529. The *Etheridge* Court identified three procedures that defined the jury’s role: the “case stated,” the “demurrer to the evidence,” and the “special verdict.” *Id.* (citing Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 319 (1966)).

²³⁵ *Id.* (“[T]he jury trial guarantee secures no rights other than those that existed at common law.”).

²³⁶ *Id.* (emphasis added). According to *Etheridge*, “the jury’s sole function was to resolve disputed facts.” *Id.* Because Virginia’s jury trial guarantee only applies to disputed facts, the jury’s role was fulfilled once the facts were ascertained. *Id.* “[T]he law determine[d] the rights of the parties.” *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ See generally *id.* Presumably the case stated procedure did not apply. Instead the disputed issues of fact were resolved by common law juries. Langbein, *supra* note 233, at 527. Langbein observes that bench trials, which he defines as “adjudication by the judge sitting without a jury,” were unknown until later in the nineteenth century, well after 1776 when Virginia’s Constitution was enacted. *Id.*; see also Murphy, *supra* note 9, at 361 (describing the only exception to the common law tradition of “jury-determined compensation” as a situation where “an action sought a certain sum and judgment for the plaintiff [that] had been entered by default or demurrer”).

civil jury trial rights as it existed in the common law.²⁴⁰ *Sofie* involved a \$1,345,833 damage award that was reduced to \$316,377.45 pursuant to section 4.56.250 of the Revised Code of Washington, which capped noneconomic damages in personal injury and wrongful death cases using a formula based on the plaintiff's age.²⁴¹ Austin Sofie was a sixty-seven-year-old married man and career pipe-fitter who suffered from mesothelioma, the cause of which was asbestos exposure.²⁴² Damages proven at trial included "extreme pain" and "consuming physical agony" that could be only temporarily lessened with "morphine cocktails" or hot baths.²⁴³ The *Sofie* trial judge found the jury's award reasonable, but reduced it in compliance with Washington's cap.²⁴⁴ The Washington Supreme Court ruled section 4.56.250 violated the *inviolable* civil jury trial guarantee contained in Article I, section 21 of the Washington Constitution.²⁴⁵

Sofie began with the same reasoning, but reached a different outcome than *Etheridge*. Like *Etheridge*, *Sofie* presumed the cap was constitutional.²⁴⁶ *Sofie* also recognized the inapplicability of the Seventh Amendment Civil Jury Trial Clause.²⁴⁷ Instead, *Sofie* focused its examination on the civil jury trial right as it existed in the common law when Washington's Constitution was adopted in 1889.²⁴⁸ (Virginia's constitution was adopted over a century earlier.) This historical "point in time"²⁴⁹ determined the scope of the right to a civil jury under a state's constitution, as well as the causes of action to which that right applied.²⁵⁰

²⁴⁰ See *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 716 (Wash. 1989) (noting that the right to a jury trial at common law "included the determination of damages").

²⁴¹ *Id.* at 712–13. Revised Code of Washington section 4.56.250(2) provided, in part, that "[i]n no action seeking damages for personal injury or death may a claimant recover a judgment for noneconomic damage exceeding an amount determined by multiplying 0.43 by the average annual wage and by the life expectancy of the person incurring noneconomic damages." *Id.* at 713 n.1. The *Sofie* jury awarded economic damages in the amount of \$191,241. *Id.* at 713. The jury also awarded noneconomic damages in the amount of \$1,154,592. *Id.* Of this, Mr. Sofie was awarded \$477,200 for pain and suffering and Mrs. Sofie was awarded \$677,392 for loss of consortium. *Id.*

²⁴² *Id.* at 712–13.

²⁴³ *Id.* at 713.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 712. The *Sofie* court described the civil jury trial issue as dispositive of the case. *Id.* at 715.

²⁴⁶ *Id.* at 715–16. *Sofie* categorized the cap as economic legislation, and thus the presumptions upon which the cap was based needed to survive a reasonableness review. *Id.* at 715.

²⁴⁷ *Id.* at 716 (citing *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916); *Walker v. Sauvinet*, 92 U.S. 90 (1876)); see also *Wright & Williams*, *supra* note 173, at 482–94 (discussing the "unincorporated" Seventh Amendment Civil Jury Trial Clause).

²⁴⁸ *Sofie*, 771 P.2d at 716 (citing *State ex rel. Goodner v. Speed*, 640 P.2d 13 (Wash. 1982); *In re Ellern*, 160 P.2d 639 (Wash. 1945); *State ex rel. Mullen v. Doherty*, 47 P. 958 (Wash. 1897)).

²⁴⁹ *Id.* at 720 (citing *Dimick v. Schiedt*, 293 U.S. 474, 487 (1935)).

²⁵⁰ *Id.* at 716.

Sofie looked further beyond the question of legislative authority than *Etheridge*. *Sofie* held there was no “issue whether the right to a jury attach[ed]” because both the economic and noneconomic components of compensatory damages were “clearly” issues of fact.²⁵¹ Despite its earlier protestations of the inapplicability of the Seventh Amendment, *Sofie* looked to interpretations of the federal civil jury trial right for guidance.²⁵² The *Sofie* court found that although “newer” tort theories” were alleged, the heart of *Sofie*’s claim was negligence or other misconduct that resulted in personal injury.²⁵³ These types of personal injuries were among those the common law recognized in 1889.²⁵⁴

Etheridge and *Sofie* also conflict on whether state civil jury trial rights are resistant to legislative attempts to alter the civil jury’s role as the fact-finder on compensatory damages.²⁵⁵ *Sofie* professed to examine the issue separately, but, as demonstrated, essentially questioned whether the amount of damages was an issue of fact “within the jury’s province.”²⁵⁶ *Sofie* held that the constitutional nature of the right to a civil jury trial prohibited modifications by legislative action.²⁵⁷ In effect, Washington’s legislature had the authority “to define parameters of a cause of action” and prescribe factors to determine liability.²⁵⁸ But Washington’s legislature could not “predetermin[e] the limits of the jury’s fact-finding power[.]” or preset damages in common law–based personal injury cases.²⁵⁹ *Sofie* reasoned that Washington’s cap impermissibly changed the trial’s outcome from a jury’s determination to a predetermined one by

²⁵¹ *Id.* at 718.

²⁵² *Id.* at 717–18 (discussing *Dimick*, 293 U.S. at 478, and *Tull v. United States*, 481 U.S. 412, 417 (1987)).

²⁵³ *Id.* at 718–19 (explaining that a “basic cause of action remains” as arising in tort even if a newer theory of recovery is alleged).

²⁵⁴ *Id.* at 718.

²⁵⁵ Compare *id.* at 720 (“Constitutional protections are not directly subject to common law changes.”), with *Etheridge v. Med. Ctr. Hosp.*, 376 S.E.2d 525, 532 (Va. 1989) (“Broad legislative authority exists to alter civil jury trial rights as they existed in the common law.”). The *Sofie* court reasoned that *Etheridge* and other state supreme court opinions either failed to analyze “the jury’s role in the matter” or failed to engage “the historical constitutional analysis used . . . in construing the right to a jury.” *Sofie*, 771 P.2d at 723–24.

²⁵⁶ *Sofie*, 771 P.2d at 721. The jury’s findings on the issue of damages enjoyed a presumption of validity and could not be altered unless unsupported by the evidence. *Id.*

²⁵⁷ *Id.* at 719. *Sofie* relied primarily on *Baker v. Prewitt*, 19 P. 149 (Wash. 1888), which provided “clear evidence that the jury’s fact-finding role included the determination of damages.” *Id.* at 716; see also *Bingaman v. Grays Harbor Cmty. Hosp.*, 699 P.2d 1230, 1232 (Wash. 1985) (holding that the amount of damages was an issue within the province of a properly instructed jury).

²⁵⁸ *Sofie*, 771 P.2d at 727.

²⁵⁹ *Id.* *Sofie* recognized that legislative power to “shape” litigation did not include the ability to alter constitutional protections. *Id.* at 719. Caps allowed the jury’s findings to “go unheeded,” which did not afford sufficient constitutional protection for the right. *Id.* at 721.

the legislature.²⁶⁰ This reduced the civil jury trial right to a shadow with no substance.²⁶¹ To the extent that other procedures allowed modification of the jury's determination of damages, exercises of such authority were rare and involved case-by-case determinations of excessiveness.²⁶² *Sofie* ruled that Washington's cap imposed compensatory damages that were unsupported by the evidence and constituted a "legislative attempt to mandate legal conclusions."²⁶³ To rule otherwise would result in civil juries existing in form, but having no effect in function.²⁶⁴

After *Sofie*, state supreme courts more commonly agreed with *Etheridge* that compensatory damage caps did not violate state civil jury trial rights.²⁶⁵ For example, in

²⁶⁰ *Id.* at 720. *Sofie* described this change as a direct infringement on the civil jury trial right. *Id.* at 720–21.

²⁶¹ *Id.* at 721 (declaring that the Washington "[C]onstitution deals with substance, not shadows").

²⁶² *Id.* at 720–21; *see also id.* at 724 (comparing cap procedure with remittitur procedure).

²⁶³ *Id.* at 721. Findings of law are "constitutionally within the province of the judiciary, not [l]egislature[s]." *Id.*

²⁶⁴ *Id.* at 724.

²⁶⁵ *See, e.g., Zagklara v. Sprague Energy Corp.*, 919 F. Supp. 2d 163, 165 (D. Me. 2013) (\$500,000 cap for noneconomic damages in wrongful death cases was constitutional except in maritime cases); *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002) (\$1 million cap against noneconomic damages in personal injury cases and \$400,000 cap in wrongful death cases did not infringe on the right to a civil jury trial); *Stinnett v. Tam*, 198 Cal. App. 4th 1412 (2011) (\$250,000 cap against noneconomic damages did not violate state civil jury trial clause); *Univ. of Miami v. Echarte*, 618 So. 2d 189, 191–93 (Fla. 1993) (summary conclusion that \$350,000 noneconomic damage cap against medical practitioners for injury or wrongful death did not violate state civil jury trial clause when party requests arbitration); *Kirkland v. Blaine Cty. Med. Ctr.*, 4 P.3d 1115 (Idaho 2000) (\$400,000 noneconomic damage cap in personal injury cases did not violate state civil jury trial clause; no litigation on subsequently enacted \$250,000 cap); *Miller v. Johnson*, 289 P.3d 1098 (Kan. 2012) (\$250,000 cap against noneconomic damages in personal injury cases did not violate state civil jury trial clause); *Samsel v. Wheeler Transp. Serv.*, 789 P.2d 541 (Kan. 1990) (\$250,000 cap against noneconomic damages in personal injury cases did not violate the state civil jury trial right), *disapproved of by* *Bair v. Peck*, 811 P.2d 1176 (Kan. 1991); *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992) (\$350,000 cap against noneconomic damages in personal injury cases did not violate state jury trial right), *aff'd by* *DRD Pool Serv. v. Freed*, 5 A.3d 45, 55–57 (Md. 2010) (\$650,000 cap approved under state constitution on the basis of *stare decisis*); *Zdrojewski v. Murphy*, 657 N.W.2d 721 (Mich. Ct. App. 2002) (\$280,000 cap against noneconomic damages—except in cases where the plaintiff was left hemiplegic, paraplegic, quadriplegic, cognitively disabled, or unable to procreate—did not violate state civil jury trial clause because state legislature had the right to modify common law rights of actions and statutory remedies), *enforced by* *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513 (6th Cir. 2005) (cap did not violate the Seventh Amendment Civil Jury Trial Clause or the Fourteenth Amendment Equal Protection Clause); *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992) (\$350,000 noneconomic damage cap in medical malpractice cases did not violate state civil jury trial clause), *overruled by* *Watts v. Cox Med. Ctrs.*, 376 S.W.3d 633 (Mo. 2012) (\$350,000 cap violated state civil jury trial clause); *Gourley ex rel. Gourley v.*

Kirkland v. Blaine County Medical Center, a claim was originally brought in the District of Idaho against a doctor and a hospital who provided prenatal care to Sandy Kirkland and her newborn son Bryce.²⁶⁶ The jury awarded compensation in the amount of \$29.7 million, which included a noneconomic damage award of \$18.5 million.²⁶⁷ Idaho's noneconomic damage cap, which at the time amounted to \$400,000, was applied to the 25% of the award for which the hospital was liable.²⁶⁸ Pursuant to section 6-1603(4) of the Idaho Code, the cap was not applied to the 75% of the award for which the doctor was liable.²⁶⁹ This was based on the jury's finding that

Nebraska Methodist Health Sys., 663 N.W.2d 43 (Neb. 2003) (\$1.25 million cap against total damages did not violate state civil jury trial clause); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007) (cap of \$250,000 or "three times the economic damages up to a maximum of \$350,000 or \$500,000" did not violate state civil jury trial clause); *Knowles ex rel. Knowles v. United States*, 544 N.W.2d 183 (S.D. 1996) (\$500,000 cap against non-economic damages, unlike \$1,000,000 cap against total damages, did not violate state civil jury trial clause), *superseded by statute*, S.D. CODIFIED LAWS § 21-3-11 (1997), *as recognized by Peterson ex rel. Peterson v. Burns*, 635 N.W.2d 556 (S.D. 2001); *Judd v. Drezga*, 103 P.3d 135 (Utah 2004) (\$250,000 noneconomic damages cap did not violate state civil jury trial clause); *MacDonald v. City Hosp., Inc.*, 715 S.E.2d 405 (W. Va. 2011) (\$250,000 non-economic damage cap in medical malpractice cases extended to \$500,000 for wrongful death and serious injuries did not violate state civil jury trial right); *Guzman v. St. Francis Hosp., Inc.*, 623 N.W.2d 776 (Wis. Ct. App. 2000) (\$350,000 noneconomic damage cap in medical malpractice cases did not violate state civil jury trial clause), *overruled on other grounds by Ferdon ex rel. Petrucelli v. Wisconsin Patients Comp. Fund*, 701 N.W.2d 440 (Wis. 2005) (\$350,000 cap violated state constitutional guarantee of equal protection; no litigation on subsequently enacted \$750,000 noneconomic damage cap). *But see Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010) (\$350,000 noneconomic damage cap in medical malpractice cases violated state civil jury trial clause). *Compare Lakin v. Senco Prods., Inc.*, 987 P.2d 463 (Or. 1999) (\$500,000 noneconomic damages cap in personal injury cases violated state civil jury trial right), *and Klutschkowski v. PeaceHealth*, 311 P.3d 461 (Or. 2013) (same), *with Greist v. Phillips*, 906 P.2d 789 (Or. 1995) (en banc) (\$500,000 noneconomic damage cap in wrongful death case did not violate state civil jury trial clause), *and Hughes v. PeaceHealth*, 178 P.3d 225 (Or. 2008) (same). *See generally Watson v. Hortman*, 844 F. Supp. 2d 795 (E.D. Tex. 2012) (rejecting contention the noneconomic damage cap imposed after state constitutional amendment violated the Fifth Amendment Takings Clause or the right to access courts); *Rose v. Doctors Hosp.*, 801 S.W.2d 841 (Tex. 1990) (upholding noneconomic damage cap in wrongful death cases), *superseded by statute*, TEX. CIV. PRAC. & REM. CODE ANN. §§ 71.002, .021 (West 2015), *as recognized in Naumann v. Lee*, No. 03-11-00066, 2012 WL 1149290 (Tex. Ct. App. 2012) (unreported).

²⁶⁶ 4 P.3d 1115, 1115–16 (Idaho 2000). Bryce suffered the primary injuries. *Id.* at 1116.

²⁶⁷ *Id.* at 1116–17. Bryce was awarded economic damages in the amount of \$11,215,077 and noneconomic damages in the amount of \$15,000,000. *Id.* Mr. and Mrs. Kirkland were awarded noneconomic damages in the amount of \$3,500,000. *Id.* at 1117.

²⁶⁸ *Id.* Enforcement of Idaho Code section 6-1603 reduced damages against the hospital from \$3,750,000 to \$573,000. *Id.*

²⁶⁹ *Id.*; *see also* IDAHO CODE ANN. § 6-1603(4) (West 2015).

the doctor was reckless.²⁷⁰ After the verdict, certification was sought in the Idaho Supreme Court on several issues of state law, including whether the cap violated the *inviolable* civil jury trial right contained in Article I, section 7 of the Idaho Constitution.²⁷¹

Kirkland's agreement with *Etheridge* is of note, because the Idaho Legislature amended section 6-1603 to lower its noneconomic damage cap shortly after the *Kirkland* decision.²⁷² Like *Etheridge* (and *Sofie*), *Kirkland* professed to interpret the scope of Idaho's civil jury trial right as it existed in the common law at the time Idaho's Constitution was adopted, which was in 1890.²⁷³ Although by 1871 Idaho generally recognized the right of the jury to assess and award damages in personal injury cases,²⁷⁴ Idaho's Legislature had authority to abolish or modify common law rights and remedies.²⁷⁵ Idaho's mandate of capped compensation in medical malpractice cases was described as such a modification.²⁷⁶ *Kirkland* agreed with *Etheridge*'s reasoning

²⁷⁰ *Kirkland*, 4 P.3d at 1117.

²⁷¹ *Id.*

²⁷² IDAHO CODE ANN. § 6-1603 (West 2015) (amending § 6-1603 (1987) by lowering noneconomic damage cap to \$250,000).

²⁷³ *Kirkland*, 4 P.3d at 1118. Idaho's Constitution was adopted over a century after the adoption of Virginia's *sacred* civil jury trial right but one year after the adoption of Washington's identical *inviolable* civil jury trial right. *See supra* notes 224, 248 and accompanying text. The *Kirkland* court reasoned that by "employing the phrase 'shall remain inviolate,'" Idaho's framers "must have intended to perpetuate the right as it existed in 1890." *Kirkland*, 4 P.3d at 1118 (quoting *State v. Bennion*, 730 P.2d 952, 957 (Idaho 1986)).

²⁷⁴ *Id.*; *see also* Idaho Dep't of Law Enf't *ex rel.* Cade v. Free, 885 P.2d 381, 386 (Idaho 1994) (because civil forfeiture cases existed at the time the Idaho Constitution was adopted, the jury trial right attached).

²⁷⁵ *Kirkland*, 4 P.3d at 1118 ("All laws now in force in the territory of Idaho *which are not repugnant to this Constitution* shall remain in force until they expire by their own limitation or be altered or repealed by the legislature" (emphasis added) (citing IDAHO CONST. art. XXI, § 2)); *see also* *Dimick v. Schiedt*, 293 U.S. 474, 478 (1935) (finding that it was the duty of the jury to assess damages); *Tull v. United States*, 481 U.S. 412, 417 (1987) (requiring "a jury trial on the merits in those actions analogous to 'suits at common law'"). The *Kirkland* Court could "discern no logical reason why a statutory limitation on a plaintiffs remedy is any different than other permissible limitations on the ability of plaintiffs to recover in tort." *Kirkland*, 4 P.3d at 1119.

²⁷⁶ *Kirkland*, 4 P.3d at 1119 (citing IDAHO CODE ANN. § 6-904 (2000)) (referring to limitation on liability of government entities); IDAHO CODE ANN. § 6-1101 (West 2015) (referring to limitation on ski area operators); IDAHO CODE ANN. § 72-209 (West 2015) (referring to workers compensation laws). *Kirkland* further analogized three statutes that allowed increases to a jury's award and reasoned that the framers of Idaho's Constitution could not have intended to prohibit all laws modifying jury awards. *Kirkland*, 4 P.3d at 1119 (citing REV. STAT. OF IDAHO TERRITORY, 1887, Title VIII, Ch. III, § 1336) (allowing for double damages against quartz mill owner whose failure to enclose causes another's livestock to drink unsafe water); *id.* (citing REV. STAT. OF IDAHO TERRITORY, 1887, Title VIII, Ch. III, § 4531) (allowing for treble damages against those who unlawfully remove another's timber); *id.* (citing REV. STAT. OF IDAHO TERRITORY, 1887, Title VIII, Ch. III, § 4533) (allowing for damages amounting to triple that of actual damages for unlawful or forcible entry). *Kirkland* did not

that the scope of the civil jury trial right did not include enforcement of the jury's award of damages.²⁷⁷ With little explanation, *Kirkland* disagreed with *Sofie* that a predetermined cap "plays lip service to the form of the jury."²⁷⁸ Idaho's Legislature could predetermine the maximum value of compensatory damages regardless of the jury's findings of fact because Idaho did not guarantee *enforcement* of the jury's determination of the *value* or *amount* of the injury (at least in medical malpractice cases).²⁷⁹

Despite the initial trend of state supreme court jurisprudence in agreement with *Etheridge*, *Sofie* was recently followed by the Missouri Supreme Court in *Watts v. Cox Medical Center*.²⁸⁰ *Watts* reconsidered the constitutionality of Missouri's cap against noneconomic damages in medical malpractice cases,²⁸¹ which had been originally upheld in *Adams v. Children's Mercy Hospital*.²⁸² The *Watts* jury awarded \$1.45 million in noneconomic damages for injuries to a mother and a newborn that arose during prenatal care and delivery.²⁸³ The trial judge, citing *Adams*, reduced noneconomic damages to \$350,000 pursuant to section 538.210 of the Missouri Revised Statutes.²⁸⁴

Like the Virginia, Washington, and Idaho supreme courts, the Missouri Supreme Court initially focused on the scope of the *inviolable* civil jury trial right as it existed

distinguish between the above mentioned causes of action and common law actions in tort. *Id.* at 1119–20. Nevertheless, *Kirkland* reasoned that these preratification statutes were demonstrative of the Idaho Legislature's power to modify the common law. *Id.*

²⁷⁷ *Kirkland*, 4 P.3d at 1120. *Kirkland* reasoned the jury's fact-finding role was not diminished because the cap only limited the legal consequences of the jury's finding. *Id.* "Nothing . . . prohibits a plaintiff from presenting [their] full case to the jury and having the jury determine the facts . . . based on the evidence presented at trial." *Id.* Because the jury was not instructed about the cap, they were "free to make all factual determinations relevant to the case," even if such determinations were not enforced. *Id.*

²⁷⁸ *Id.* (agreeing with *Etheridge* that the right to a jury only entitles a party to a jury's verdict, not enforcement of the jury's award).

²⁷⁹ *Id.* at 1119–20 (maintaining that "[t]he legal consequences and effect of a jury's verdict are a matter for the legislature . . . and the courts"). But see Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 730 (1993) (describing fact-finding as a "qualitative assessment of the facts" and a "determination of the legal consequences of the facts"). Murphy hypothesized that the United States Constitution designated fact-finding as within the province of the jury because juries were the best investigators of the truth. *Id.* at 746–47.

²⁸⁰ 376 S.W.3d 633 (Mo. 2012).

²⁸¹ *Id.* at 635.

²⁸² *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992). *Adams* held that the amount of damages was a question of law, not fact, and thus not within the jury's purview. *Id.* at 907. Relying on *Etheridge*, the *Adams* court also noted that Missouri's cap only applied after the jury completed its constitutional duty—rendering the verdict. *Id.* In effect, Missouri's Legislature had the right to "abrogate a cause of action cognizable under common law completely" and thus "limit recovery in those causes of action." *Id.*

²⁸³ *Watts*, 376 S.W.3d at 635.

²⁸⁴ *Id.* at 635–36.

in the common law when Missouri's Constitution was adopted in 1820,²⁸⁵ fifty years after the adoption of the Virginia Constitution but before adoption of the Washington and Idaho Constitutions.²⁸⁶ *Watts* held that the scope of the common law civil jury's fact-finding role included the *amount* or *value* of compensatory damages.²⁸⁷ In direct contradiction to *Etheridge*, *Watts* found that from approximately 1607, the English common law allowed jury awards for both economic and noneconomic damages arising out of medical negligence.²⁸⁸

Like *Sofie*, *Watts* acknowledged that some common law procedures allowed modification of the jury's award.²⁸⁹ But unlike *Etheridge* and *Kirkland*, *Watts* recognized that those procedures were rarely authorized.²⁹⁰ Missouri retained the common law's long standing reluctance to interrupt the jury's factual findings.²⁹¹ Compensatory damage caps in tort cases neither existed nor were contemplated by the common law when Missouri enacted its civil jury clause.²⁹² *Watts* overruled *Adams* to the extent that it misconstrued the nature of the civil jury trial right once it attached.²⁹³ The Missouri Legislature lacked authority to abolish or modify state constitutional

²⁸⁵ *Id.* at 637–38. The scope of Missouri's civil jury trial right was also "defined by common law limitations on the amount of a jury's damage award." *Id.* at 638.

²⁸⁶ See VA. CONST. (1776); WASH. CONST. (1878); IDAHO CONST. (1890).

²⁸⁷ *Watts*, 376 S.W.3d at 639–40 (recognizing the jury's constitutional task as fact-finding on both liability and damages).

²⁸⁸ *Id.* at 638, 640 (explaining that "the amount of noneconomic damages is a fact that must be determined by a jury" and is protected by the state civil jury trial right). The *Watts* court also noted that in the English common law medical negligence was recognized as one of five types of private wrongs that were brought in courts of law, but not in equity or admiralty. *Id.* at 638.

²⁸⁹ *Id.* at 640–41 (discussing remittitur procedure and the rarity of its use in Missouri for fear of tampering with the jury's constitutional role as finder of fact).

²⁹⁰ *Id.* at 638 (noting that English common law judges granted new trials only in cases in which the verdict was deemed inconsistent with the evidence).

²⁹¹ *Id.* at 639.

²⁹² *Id.* (stating that "the right to trial by jury was not subject to legislative limits on damages" in 1820 when Missouri's Constitution was adopted).

²⁹³ *Id.* at 641–46. According to the *Watts* court, *Adams*'s holding that Missouri's civil jury trial right did not protect an award of damages suffered from four fundamental flaws. *Id.* at 642. First, *Adams* fundamentally misconstrued the nature of the civil jury trial right in that the determination of damages was one of the most significant constitutional roles performed by the jury. *Id.* Second, the unavoidable result of *Adams* was that the civil jury trial right was directly subject to legislative limitations, which impermissibly alters constitutional norms. *Id.* (stating "a statute may not infringe on a constitutional right; if the two are in conflict, then it is the statute rather than the constitution that must give way" (citations omitted)). Third, *Adams*'s reliance on *Tull* for the proposition that the civil jury trial right did not extend to damages was misplaced because the latter concerned civil penalties, not common law damages. *Id.* at 643–44. Finally, *Adams* failed to examine how Missouri's *inviolable* civil jury trial right was distinguishable from Virginia's civil jury trial right, and thus the *Adams* court erred in relying on *Etheridge* instead of the plain language of the Missouri Constitution. *Id.* at 644.

procedures if such procedures reflected common law principles.²⁹⁴ Because the common law recognized causes of action in tort for medical negligence, the jury trial right attached to these claims.²⁹⁵ Thus, the jury's findings on *both* liability and damages were "beyond the reach of hostile legislation."²⁹⁶

The state supreme court split on compensatory damage caps reveals a fundamental disagreement about the civil jury's role to award compensatory damages in common law cases. Murphy describes this conflict as a larger question concerning legislative prerogative and jury authority to determine damages.²⁹⁷ The core dispute among states is the scope of legislative power to alter a civil jury's determination of the value of an injury.²⁹⁸

²⁹⁴ See *id.* at 640 (holding the jury trial right does not remain inviolate if the jury's award of damages in accord with the facts of the case are changed).

²⁹⁵ *Id.* at 638.

²⁹⁶ *Id.* at 640.

²⁹⁷ Murphy, *supra* note 9, at 348–49 (framing the issue as whether and to what extent may "the legislature alter the norm of jury determination of compensation," and warning that "the legislature may not interfere with an 'essential function' of jury trial" right).

²⁹⁸ After *Etheridge* and *Sofie*, state courts also disagreed on whether caps violate other provisions of state constitutions. Compare *Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156, 164 (Ala. 1991) (\$400,000 cap against noneconomic damages unconstitutionally burdened the state right to a trial); *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895, 914 (Ill. 2010) (\$500,000 cap against noneconomic damages constituted an unconstitutional state legislative remittitur); *Best v. Taylor Machine Works*, 689 N.E.2d 1057, 1078–81 (Ill. 1997) (\$500,000 cap against noneconomic damages constitutes unconstitutional special legislation and violated the state separation of powers clause); *Brannigan v. Usitalso*, 587 A.2d 1232, 1232 (N.H. 1991) (\$875,000 noneconomic damage cap violated the state equal protection clause); *Ohio ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1091–1100 (Ohio 1999) (\$250,000 to \$500,000 sliding scale cap against noneconomic damages violated the state due process and separation of powers clauses, as well as the one subject rule for state legislative acts); *Woods v. Unity Health Ctr., Inc.*, 196 P.3d 529, 531 (Okla. 2008) (service rules in medical malpractice cases was an impermissible special law under the state constitution); *Ferdon v. Wisconsin Patients Comp. Fund*, 701 N.W.2d 440, 447 (Wis. 2005) (\$350,000 cap violated the state constitutional guarantee of equal protection, but no litigation on subsequent \$750,000 noneconomic damage cap), with *Stinnett v. Tam*, 198 Cal. App. 4th 1412, 1417 (2011) (\$250,000 cap against noneconomic damages did not violate the state equal protection clause); *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901, 904–06 (Colo. 1993) (\$1 million cap against total damages and \$300,000 cap against noneconomic damages neither infringes on a fundamental right nor affects a suspect classification, and cap met rational basis standard under the state constitution); *Univ. of Miami v. Echarte*, 618 So. 2d 189, 190–91 (Fla. 1993) (\$500,000 noneconomic damage cap against medical providers and \$1 million noneconomic damage cap against medical practitioners for injury or wrongful death due to medical negligence do not violate the single subject rule for state legislature acts, the state nondelegation doctrine, the state right to access to courts, or the equal protection, substantive due process, or takings clauses of the state constitution), *overruled in part by Estate of McCall v. United States*, 134 So. 3d 894, 897 (Fla. 2014) (noneconomic damage cap in wrongful death cases violated the state equal protection clause); *Samsel v. Wheeler*

Transp. Serv., 789 P.2d 541, 557–58 (Kan. 1990) (\$250,000 cap against noneconomic damages did not violate the state constitutional right to reparation for an injury after due process), *disapproved of by* Bair v. Peck, 811 P.2d 1176 (Kan. 1991); Oliver v. Magnolia Clinic, 85 So.3d 39, 44–45 (La. 2012) (\$500,000 cap against general damages in medical malpractice cases did not violate the equal protection and adequate remedies provision of the state constitution); Butler v. Flint Goodrich Hosp. of Dillard Univ., 607 So.2d 517, 519–21 (La. 1992) (\$500,000 cap against total damages, except future medical expenses, did not violate the state due process or equal protection clauses); Murphy v. Edmunds, 601 A.2d 102, 116 (Md. 1992) (\$350,000 cap against noneconomic damages in personal injury cases did not violate the state equal protection clause), *aff'd by* DRD Pool Serv. v. Freed, 5 A.3d 45, 48–50 (Md. 2010) (\$500,000 cap constitutional on basis of *stare decisis*); Schweich v. Ziegler, 463 N.W.2d 722, 727 (Minn. 1990) (\$400,000 cap against intangible losses does not violate the state constitutional right to a remedy); Adams v. Children's Mercy Hosp., 848 S.W.2d 898, 905–06 (Mo. 1992) (\$350,000 noneconomic damage cap in medical malpractice cases did not violate the state equal protection clause or open courts doctrine), *overturned on other grounds by* Watts v. Cox Med. Ctr., 376 S.W.3d 633 (Mo. 2012); Gourley *ex rel.* Gourley v. Nebraska Methodist Health Sys., 663 N.W.2d 43 (Neb. 2003) (\$1.75 million cap against total damages did not violate principles prohibiting special legislation, the state equal protection clause, open courts doctrine, or separation of powers doctrine); Fed. Express Corp. v. United States, 228 F. Supp. 2d 1267, 1270–71 (D.N.M. 2002) (\$600,000 cap against total damages did not violate the state equal protection clause); Arbino v. Johnson & Johnson, 880 N.E.2d 420, 448–49 (Ohio 2007) (\$350,000 to \$1 million cap did not violate the state right to a remedy, the open courts doctrine, or the due process or equal protection clauses, nor did cap violate the state separation of powers doctrine or the single subject rule for state legislative acts); Judd v. Drezga, 103 P.3d 135, 145 (Utah 2004) (\$250,000 noneconomic damages violated neither separation of powers doctrine, open courts doctrine, uniform operation of laws, nor due process provisions of the state constitution); Guzman v. St. Francis Hosp., 623 N.W.2d 776, 787–89 (Wis. 2000) (\$350,000 noneconomic damage cap in medical malpractice cases did not violate the state equal protection or due process clauses, nor did cap violate the state constitutional right to access to courts or the state separation of powers doctrine), *overruled on other grounds by* Ferdon *ex rel.* Petrucelli v. Wisconsin, 701 N.W.2d 440, 454–56 (Wis. 2005); Robinson v. Charleston Area Med. Ctr., 414 S.E.2d 877, 880 (W. Va. 1991) (\$1 million noneconomic damage cap in medical malpractice cases did not violate the state equal protection or substantive due process clauses, nor did cap constitute special legislation), *aff'd by* Verba v. Ghaphery, 552 S.E.2d 406, 407–08 (W. Va. 2001) (cap did not violate equal protection clause or separation of powers doctrine), *aff'd by* MacDonald v. City Hosp., Inc., 715 S.E.2d 405, 409 (W. Va. 2011) (\$500,000 cap did not violate separation of powers, equal protection, special legislation, or special remedies provisions of the state constitution). Some courts were in disagreement on the constitutionality of caps before *Etheridge* and *Sofie*. Compare Carson v. Maurer, 424 A.2d 825, 835–36 (N.H. 1980) (\$250,000 noneconomic damage cap in medical malpractice cases violated the state equal protection clause), with Hoffman v. United, 767 F.2d 1431, 1435–37 (9th Cir. 1985) (\$250,000 cap against noneconomic damages did not involve a suspect class or a fundamental right and rational basis standard was proper standard of review); Fein v. Permanente Med. Grp., 695 P.2d 665, 682 (Cal. 1985) (\$250,000 cap against noneconomic damages do not violate the state due process or equal protection clauses); Prendergast v. Nelson, 256 N.W.2d 657, 672 (Neb. 1977) (defendant failed to rebut the presumption of the cap's constitutionality). *But see* Lucas v. United States, 757 S.W.2d 687, 688–92 (Tex. 1988) (\$500,000 cap against noneconomic

The Seventh Amendment adopts the common law view that the amount of damages is a fact that must be found by the civil jury and that the jury's award was fully enforceable.²⁹⁹ Senator Sheldon Whitehouse agrees with this point and argues that at its core, the civil jury's function is essentially fact-finding.³⁰⁰ But as the Washington Supreme Court noted in *Sofie*, the federal civil jury trial right is unenforceable against the states.³⁰¹

The state supreme court split on the civil jury's role to award compensatory damages is a curious one. The United States Supreme Court has long held that the nature and scope of the civil jury right historically included a jury determination of the amount of damages.³⁰² In *St. Louis, Iron Mountain & Southern Railway Company v. Craft*, the Court examined whether a \$5,000 award for pain and suffering in a wrongful death action under a federal statute was excessive.³⁰³ The Court acknowledged the common law distinction between the availability of damages in personal injury and wrongful death cases.³⁰⁴ At common law, the right of action for personal

damages in medical malpractice cases violates open courts provision of the state constitution, but see subsequent state constitutional amendment allowing for caps). *See generally* Knowles *ex rel.* Knowles v. United States, 544 N.W.2d 183, 189–92 (S.D. 1996) (\$500,000 cap against noneconomic damages, unlike cap against total damages, did not violate the state open courts doctrine or due process clause).

²⁹⁹ *Dimick v. Schiedt*, 293 U.S. 474, 476–78 (1935); *Tull v. United States*, 481 U.S. 412, 417 (1987); *see also* Murphy, *supra* note 9, at 348 (describing the Seventh Amendment as being “lost in the shuffle” of proposed federal tort reform and arguing the federal civil jury trial right’s preservation of the “role for the jury in deciding matters of compensation” could pose a barrier to federal caps).

³⁰⁰ Sheldon Whitehouse, *Restoring the Civil Jury’s Role in the Structure of Our Government*, 55 WM. & MARY L. REV. 1241, 1252 (2013) (describing the core Seventh Amendment civil jury trial function as fact-finding); Murphy, *supra* note 279, at 726–27 (describing fact-finding as a “constitutional function of the civil jury” and describing the jury’s purpose as serving “the ultimate goal of just adjudication”).

³⁰¹ *See* Murphy, *supra* note 279, at 724 (discussing the lack of coherent theory of “jury authority,” which Murphy defines as “the decisional role that the [United States] Constitution mandates for the jury once an entitlement to trial by jury has been triggered”). Murphy also discusses the Court’s lack of guidance on the question of why some issues are exclusively for the jury, the judge, or subject to some judicial intervention or review after a jury verdict. *Id.* at 725–26 (describing jury authority as disjointed and identifying guidelines sentencing and punitive damages as current evidence of such disjointedness); *see also* Murphy, *supra* note 9, at 351–52 (discussing the civil jury’s role as a check on legislative power and arguing that legislatures cannot invade the jury’s constitutional authority).

³⁰² *See, e.g., St. Louis, Iron Mountain & S. Ry. Co. v. Craft*, 237 U.S. 648 (1915).

³⁰³ *Id.* at 652–54. The federal statute at issue was the employer’s liability act of 1908, which had been amended in 1910. *Id.* at 653. A widow and her children filed the action after the decedent was killed in an automobile accident. *Id.* at 653–54. The jury awarded \$11,000 for the deceased’s postaccident pain and suffering. *Id.* at 654. The award was reduced to \$5,000. *Id.*

³⁰⁴ *Id.* at 655.

injuries died with the decedent, and the wrongful death of a person often afforded no basis for recovery of pain and suffering.³⁰⁵ Because the federal statute at issue provided for such recovery, the Court turned its attention to whether the award for pain and suffering was excessive.³⁰⁶ On this issue the Court noted that while the award seemed large, the power, duty, and responsibility to determine damages involved “*only a question of fact*.”³⁰⁷

Craft signals the Court’s view that one of the civil jury’s primary roles was to find an appropriate amount that would indemnify the plaintiff for legally recognized *concrete* and *actual* losses.³⁰⁸ Professor Emeritus Dan Dobbs, a prolific scholar on the law of remedies,³⁰⁹ describes the aim of compensatory damage awards in personal injury cases as “compensating the victim or making good the losses proximately resulting from the injury.”³¹⁰ Dobbs also characterizes both the economic loss and noneconomic loss components of the compensatory damage award as redress for an injured party’s losses.³¹¹ The redress of such losses historically constitutes a legal remedy for which a jury is required.³¹² The jury’s assessment includes the injury itself and the extent of harm or value of the injury.³¹³ Both presented a question of “*historical or predictive fact*.”³¹⁴ According to Dobbs, such facts varied with “the kind of harm suffered.”³¹⁵

As discussed in the previous Section, the Court’s recent punitive damage jurisprudence presumes that compensatory damages fully account for actual and concrete losses.³¹⁶ As demonstrated in this Section, this is a false presumption in states that impose mandatory caps against compensatory damage awards. The *Gore* punitive

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 661 (emphasis added).

³⁰⁸ *Id.* at 655, 661.

³⁰⁹ See DAN B. DOBBS, LAW OF REMEDIES § 3.1 (2d ed. 1993).

³¹⁰ DOBBS, *supra* note 5, § 8.1(1) (discussing requirement that personal injury damages be proved and calculated at the trial).

³¹¹ *Cooper Indus. v. Leatherman Tool Grp.*, 532 U.S. 424, 432 (2001); see also DOBBS, *supra* note 309, § 1.1 (distinguishing between “damages as compensation” and “noncompensatory monetary awards”).

³¹² DOBBS, *supra* note 309, § 1.2 (distinguishing between remedies at law and remedies in equity and discussing requirement of a jury where the remedy is purely legal); see also Murphy, *supra* note 9, at 349 (discussing compensatory damages and characterizing the determination of compensation as being “at the heart of the jury’s constitutional province”).

³¹³ *Cooper Indus.*, 532 U.S. at 432; see also Whitehouse, *supra* note 300, at 1262 (discussing the broad discretion of the American civil jury “to determine the appropriate amount of damages”).

³¹⁴ *Cooper Indus.*, 532 U.S. at 437 (emphasis added).

³¹⁵ DOBBS, *supra* note 309, § 3.3(1) (explaining the lack of universal measurement of damages).

³¹⁶ See *Cooper Indus.*, 532 U.S. at 432 (noting that compensatory damages “are intended to redress the concrete loss that the plaintiff has suffered”).

damage analysis includes a comparison of the ratio between punitive and compensatory damages.³¹⁷ But the Court offers no guidance as to what constitutes the starting point of *Gore*'s comparison in cap regimes. The Court has also remained silent on whether compensatory damage caps critically flaw *Gore*'s punitive damages analysis. Part III of this Article considers these fundamental questions.

III. UNCAPPING COMPENSATION IN THE *GORE* PUNITIVE DAMAGE ANALYSIS

In this part, this Article suggests that the *Gore* punitive damage analysis is resistant towards application of compensatory damage caps. *Gore* presumes that compensatory damages fully account for actual and concrete losses in an individual case.³¹⁸ Compensatory damage caps do not consider the individual facts and circumstances of a case. *Exxon Shipping* reasons that no "standard tort injury" exists.³¹⁹ Legislatures are unable to account for variation among individual cases because there is no "particular dollar figure that is appropriate across the board."³²⁰ *Exxon Shipping* also rejected the rationale that civil jury awards suffered from systematic excessiveness.³²¹ Instead, unpredictability is of a greater concern (at least with respect to punitive damage awards, which should only punish a defendant for actual harm to the plaintiff).³²² Professor Jill Wieber Lens argues that by necessity compensatory damages in tort mandate "inconsistency and unpredictability."³²³ This Article agrees with Lens that unpredictability is of a lesser concern with regard to compensatory damages.³²⁴

Gore, its predecessors, and its progeny rely on the "reasonable relationship" in the common law between compensatory and punitive damages.³²⁵ Consistent with common law principles, *Gore* relies on individualized review of damages and tasks judges, not legislatures, as the proper check on the civil jury.³²⁶ Procedures that impose compensatory damage caps constitute a "one-size-fits-all" approach that lacks individuality or flexibility.³²⁷ The common law does not appear to empower state

³¹⁷ See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580–83 (1996).

³¹⁸ See *id.*

³¹⁹ *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 506 (2007).

³²⁰ *Id.*

³²¹ *Id.* at 449–500.

³²² *Id.*

³²³ See Jill Wieber Lens, *Punishing for the Injury: Tort Law's Influence in Defining the Constitutional Limitations on Punitive Damage Awards*, 39 HOFSTRA L. REV. 595, 630–31 (2014) (arguing "tort law requires personalization to the plaintiff's injury" and that "to fully compensate, the damages must focus on the specific plaintiff").

³²⁴ *Id.* at 634–35 (explaining that there is less concern for predictability and consistency with regards to civil jury awards in tort cases because tort law's injury requirement gives way to the need to personalize damages to specific disputes).

³²⁵ *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580–81 (1996).

³²⁶ *Id.* at 569–74.

³²⁷ See *id.* at 569–70.

legislatures with authority to “check” the civil jury³²⁸ or otherwise “curb damages.”³²⁹ Moreover, legislatively imposed caps neither existed in nor were contemplated by the common law when most colonial constitutions were enacted.³³⁰

The second *Gore* guidepost establishes compensatory damages as the “baseline” for analyzing punitive damages.³³¹ *Gore* prefers “single digit” ratios between punitive and compensatory damages,³³² but offers no guidance as to what constitutes the baseline in cap regimes: the jury’s award of compensatory damages or the capped award imposed by the legislature. Compensatory damage caps produce a drastic alteration of the balance of power between the parties in civil litigation. Tortious defendants are free to propose settlement offers that are unrelated to the provable amount of damages.³³³ But if a case proceeds to trial, a plaintiff is still required to present credible evidence of the full amount of liability, even though the judgment could ultimately constitute a fraction of the damages that were proven.³³⁴ Cap regimes impose identical compensation for dissimilar injuries and constitute an unprecedented abandonment of common law principles. If such procedures are properly applied to common law torts, what prevents the application of such procedures to common law cases arising in contract or property?

Compensatory damage caps fundamentally flaw the assumptions upon which the second *Gore* guidepost relies.³³⁵ Lens argues that both punitive and compensatory damages should be measured with a subjective focus on the plaintiff’s actual loss.³³⁶ The second *Gore* guidepost focuses on the individual facts of a case,³³⁷ but compensatory damage caps do not. In cap regimes, some categories of provable injuries are left undercompensated. Less tortious defendants pay full value for the

³²⁸ See Thomas, *supra* note 153, at 1229.

³²⁹ *Id.* (arguing that no such role existed for common law legislatures and concluding that “[u]ltimately, only a jury could decide damages subject to the new trial possibility”).

³³⁰ *Watts v. Cox Med. Ctr.*, 376 S.W.3d 633, 641–46 (Mo. 2012); see also Murphy, *supra* note 9, at 398–99 (discussing the “strong historical link between assessment of compensatory damages and the right to a civil jury trial”).

³³¹ Lens, *supra* note 323, at 633–34 (explaining that punitive damages are “pegged” to the amount of compensatory damages because “the injury for which the defendant is liable in tort . . . is the baseline for [punitive] damages”).

³³² *State Farm Auto. Ins. v. Campbell*, 538 U.S. 408, 425 (2003) (identifying single-digit multipliers as sufficient to achieve the goals of punitive damages).

³³³ See generally Sharkey, *supra* note 8 (discussing the impact of caps on settlement negotiations).

³³⁴ See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 565–66 (1996).

³³⁵ Murphy, *supra* note 9, at 407–10 (hypothesizing that the real purpose of cap legislation appears to be the limitation of jury decisions, which is a purpose in tension with the civil jury trial right of the Seventh Amendment).

³³⁶ Lens, *supra* note 323, at 623–26 (discussing tort law’s injury requirement as mandating that compensatory and punitive damages be based on the injury and nothing else).

³³⁷ See *id.* at 609.

injuries they inflict, while more tortious defendants do not.³³⁸ Surely the criminal justice system would suffer if those convicted of misdemeanors face the same punishment as those convicted of violent felonies. A civil justice system that awards compensation without regard to the severity of the injury suffers in the same manner.³³⁹

Compensatory damage caps arbitrarily cap the second *Gore* guidepost. State legislatures are allowed to innovate. But as Professor Renée Lettow Lerner argues, juries were designed to protect against “arbitrary or capricious interference of the government.”³⁴⁰ Compensatory damage caps interfere with the civil jury’s constitutionally proscribed role to “find” the amount of damages.³⁴¹ In a hypothetical cap regime where compensatory damages are limited to \$250,000, a reasonable punitive damage award under *Gore* would necessarily fall between \$250,000 and \$2.5 million if the capped award constituted the starting point for the second *Gore* guidepost. Yet, the hypothetical jury may have awarded actual and concrete loss in an amount that exceeds the higher end of *Gore*’s presumptively reasonable range for punitive damages. In this respect, this Article agrees with Dobbs’s description of compensatory damage caps as a “crude” means of controlling excessiveness.³⁴²

Several theories exist to uncap the *Gore* punitive damages analysis. First, a capped award should be rejected where procedures do not allow trial judges the opportunity to review the civil jury’s original award for reasonableness (or if the trial judge has had such opportunity and confirms an award that exceeds the cap).³⁴³ Second, a capped award should be rejected if the civil jury has not been informed of the existence of a compensatory damage cap (or if the jury has been so informed and still returns an award that exceeds the cap).³⁴⁴ Finally, a capped award should

³³⁸ See *id.* at 631–32 (arguing that consistency in compensatory damage awards in tort law would be inappropriate because of the need to fully compensate the plaintiff and warning that if the “jury’s role in awarding . . . compensatory damages is replaced with some objective measure, some plaintiffs will not receive full compensation for their injuries”); see also *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 506 (2007) (noting that because “there are no punitive damages guidelines . . . the specific amount of punitive-damages . . . will be arbitrary” (quoting *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003))).

³³⁹ Lens, *supra* note 323, at 623–26; see also Barry Meier & Hilary Stout, *Victims of G.M. Deadly Defect Fall Through Legal Cracks*, N.Y. TIMES (Dec. 29, 2014), <http://www.nytimes.com/2014/12/30/business/victims-of-gm-deadly-defect-fall-through-legal-cracks.html> [<http://perma.cc/KMS9-GVVZ>] (reporting that the existence of damage caps, among other factors, make it difficult to bring to light product defects and reporting that victims of product defects often have difficulty finding legal counsel unless the victims can “finance[] the case themselves”).

³⁴⁰ Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL RTS. J. 811, 833 (2014).

³⁴¹ See Lens, *supra* note 323, at 623–26.

³⁴² See generally DOBBS, *supra* note 309, § 8.1(4) & § 8.8 (discussing statutory caps on damages).

³⁴³ See *infra* Part III.A; see also Lens, *supra* note 323, at 623–26.

³⁴⁴ See *infra* Part III.B; see also Sharkey, *supra* note 8, at 425–28.

be rejected where the civil jury has no opportunity to reconsider or confirm an award that exceeds the cap (or where the jury has had such opportunity and actually affirmed an award that exceeds the cap).³⁴⁵ Each theory is discussed in turn.

A. Theory 1

The first rationale for uncapping compensation in the *Gore* punitive damage analysis is the failure to empower the trial judge, before application of a cap, with traditional common law authority to order a new trial if a civil jury's award is excessively high or arbitrarily low.³⁴⁶ The civil jury trial right is and always has been held in "jealous regard" by the American people,³⁴⁷ who adopted the common law view that the jury was an "indispensable element" of judicial administration.³⁴⁸ In England and in the colonial United States the jury was "generally regarded as the normal and preferable mode of disposing of issues of fact" in civil cases.³⁴⁹ Although most state constitutions are not explicit as to the exact nature and scope of the civil jury trial right, most states agree that the English common law forms the interpretive basis once the right to a jury has attached to a particular cause of action.³⁵⁰ In the common law and in colonial practice the power of the court and the

³⁴⁵ See *infra* Part III.C.

³⁴⁶ *Dimick v. Schiedt*, 239 U.S. 474, 486 (1935) (noting that where the verdict is "palpably and grossly inadequate or excessive . . . both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question[s] of liability and . . . damages"); *Baldus*, *supra* note 25, at 1127–30 (discussing the common law practice of *additur* and *remittitur* review).

³⁴⁷ *Dimick*, 293 U.S. at 478; see also *Thomas*, *supra* note 153, at 1232 ("The English viewed the jury as a protector against the judiciary, the executive, and the legislature. The American jury was established largely according to this model.").

³⁴⁸ *Whitehouse*, *supra* note 300, at 1243 (explaining that American juries have been long tasked with performing a historically pedigreed service of political libertarianism, specifically that of adjudicator of factual disputes in common law cases). In this sense, the jury is a structural element of American government that confers political importance. *Id.* at 1243–44.

³⁴⁹ *Dimick*, 293 U.S. at 485–86. Senator Whitehouse described the historical understanding of the civil jury as "an institutional check" upon and an independent element of government. *Whitehouse*, *supra* note 300, at 1244.

³⁵⁰ See, e.g., *In re One Chevrolet Auto. Senior v. State*, 87 So. 592, 592 (Ala. 1921) (noting that the preservation of the right to a civil jury does not extend to "causes unknown to the common law"); *Frank v. Golden Valley Elec. Ass'n*, 748 P.2d 752, 754 (Alaska 1988) (citing ALASKA CONST. Art. I, § 16) (preserving the right to a civil jury to the "same extent as it existed at common law"); *In re Estate of Newman*, 196 P.3d 863, 875 (Ariz. Ct. App. 2008) (preserving a right to a civil jury "only in cases where it would have existed under the common law"); *Jones v. Reed*, 590 S.W.2d 6, 13 (Ark. 1979) (extending the right to a civil jury "only to common law actions"); *Franchise Tax Bd. v. Superior Court*, 252 P.3d 450, 452 (Cal. 2011) (limiting right to a civil jury only "as it existed at common law"); *Swanson v. Boschen*, 120 A.2d 546, 549 (Conn. 1956) (recognizing right to a civil jury as extending only

to actions that were “of the same nature” as those that existed prior to 1818); *Claudio v. State*, 585 A.2d 1278, 1296 (Del. 1991) (discussing constitutional commitment to a civil jury only “as it existed at common law”); *In re Forfeiture of 1978 Chevrolet Van*, 493 So. 2d 433, 435 (Fla. 1986) (referring to the common law with regards to the right to a civil jury); *Strange v. Strange*, 148 S.E.2d 494, 495 (Ga. 1966) (guaranteeing the continuance of the right to a civil jury only as it existed at common law); *Hous. Fin. & Dev. Corp. v. Ferguson*, 979 P.2d 1107, 1114 (Haw. 1999) (referring to the common law in interpreting the scope of the right to a civil jury); *Kirkland v. Blaine Cty. Med. Ctr.*, 4 P.3d 1115, 1118 (Idaho 2000) (preserving the right to a civil jury as it existed in the common law); *In re Estate of Grabow*, 392 N.E.2d 980, 982 (Ill. Ct. App. 1979) (excluding causes of actions unknown to common law from the scope of the civil jury trial right); *Sims v. United States Fid. and Guar. Co.*, 782 N.E.2d 345, 352 (Ind. 2003) (finding prohibition against trial by civil jury reasonable where cause of action was not recognized by the common law); *Iowa Nat. Mut. Ins. v. Mitchell*, 305 N.W.2d 724, 727 (Iowa 1981) (noting that the constitutional right to a civil jury carries with it common law concepts); *Waggener v. Seever Sys.*, 664 P.2d 813, 817 (Kan. 1983) (noting that the question of whether the right to a civil jury applies is determinable on the basis of the common law); *Daniels v. CDB Bell, LLC*, 300 S.W.3d 204, 210 (Ky. 2009) (referring to the common law with regards to the right to a civil jury); *State v. Anton*, 463 A.2d 703, 709 (Me. 1983) (same); *Davis v. Slater*, 861 A.2d 78, 86–87 (Md. 2004) (holding “the common law . . . includes the law governing the entitlement to demand” a civil jury); *Stonehill Coll. v. Mass. Comm’n Against Discrimination*, 808 N.E.2d 205, 226 (Mass. 2004) (referring to the common law right to a civil jury); *State Conservation Dep’t v. Brown*, 55 N.W.2d 859, 861 (Mich. 1952) (same); *Onvoy, Inc. v. Allete, Inc.*, 736 N.W.2d 611, 617 (Minn. 2007) (referring to the common law with regards to the right to a civil jury); *Talbot & Higgins Lumber Co. v. McLeod Lumber Co.*, 113 So. 433, 437–38 (Miss. 1927) (describing the right to a civil jury as deriving from the common law); *State v. ex rel. Diehl v. O’Malley*, 95 S.W.3d 82, 86–89 (Mo. 2003) (referring to the common law to determine the scope of the right to a civil jury); *In re M.H.*, 143 P.3d 103, 106 (Mont. 2006) (rejecting applicability of the civil jury because at common law such right did not exist for the proceedings at issue); *Nebraska ex rel. Cherry v. Burns*, 602 N.W.2d 477, 482 (Neb. 1999) (preserving the right to a civil jury as it existed at common law); *Cheung v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 124 P.3d 550, 557 (Nev. 2005) (same); *Hair Excitement, Inc. v. L’Oreal USA, Inc.*, 965 A.2d 1032, 1037 (N.H. 2009) (same); *Jersey Cent. Power & Light Co. v. Melcar Util. Co.*, 59 A.3d 561, 568 (N.J. 2013) (noting the right to a civil jury applies only where the right existed at common law); *Bd. of Educ. of Carlsbad Schs. v. Harrell*, 882 P.2d 511, 522 (N.M. 1994) (explaining that litigants only have the right to a civil jury if it existed at common law); *Murphy v. Am. Home Prods. Corp.*, 527 N.Y.S.2d 1 (N.Y. App. Div. 1988) (describing the common law as the underlying determinant of whether the right to a civil jury applied); *N.C. State Bar v. DuMont*, 286 S.E.2d 89, 93 (N.C. 1982) (noting that where prerogative existed at common law, right to a civil jury applied); *North Dakota v. 17,515.00 in Cash Money*, 670 N.W.2d 826, 827 (N.D. 2003) (noting that where a demand could be made as a matter of right at common law, the civil jury right applied); *Stetter v. R.J. Corman Derailment Servs.*, 927 N.E.2d 1092, 1105 (Ohio 2010) (referring to the common law to determine the scope of the right to a civil jury); *State ex rel. Dugger v. Twelve Thousand Dollars*, 155 P.3d 858, 864 (Okla. Ct. App. 2007) (describing that the right to a civil jury as dependent upon existence of the right at common law); *Jensen v. Whitlow*, 51 P.3d 599, 604 (Or. 2002) (guaranteeing a civil jury only as it existed at common law); *Commonwealth v. One (1) 1984 Z-28 Camaro*

power of the jury were distinguished by findings of law, which were determined by the former, and findings of fact, which were determined by the latter.³⁵¹

In the common law, a civil jury's damage award was "entitled to a strong presumption of validity,"³⁵² but even in the common law inadequate or excessive civil jury awards were not allowed to stand.³⁵³ If "the verdict was excessive or trifling, the remedy was to submit the case to . . . another jury."³⁵⁴ Although authority to increase or decrease damages existed,³⁵⁵ little evidence suggested that common law courts

Coupe, 610 A.2d 36, 40 (Penn. 1992) (referring to the common law to determine the scope of the right to a civil jury); Bendick v. Cambio, 558 A.2d 941, 945 (R.I. 1989) (same); C.W. Matthews Contracting Co. v. S.C. Tax Comm'n, 230 S.E.2d 223, 226 (S.C. 1976) (same); State v. Piper, 709 N.W.2d 783, 805 (S.D. 2006) (extending scope of civil jury trial right only to causes of action that existed at common law); Helms v. Tenn. Dep't of Safety, 987 S.W.2d 545, 547 (Tenn. 1999) (same); State v. Credit Bureau of Laredo, Inc., 530 S.W.2d 288, 291–92 (Tex. 1975) (noting the right to a civil jury exists where it would have at common law); Buck v. Robinson, 177 P.3d 648, 653 (Utah Ct. App. 2008) (referring to the common law to determine the scope of the right to a civil jury); State v. Irving Oil Corp., 955 A.2d 1098, 1100–01 (Vt. 2008) (same); Ingram v. Commonwealth, 741 S.E.2d 62, 68 (Va. Ct. App. 2013) (denying civil jury because cause of action unknown to common law); Quesnell v. Washington, 517 P.2d 568, 579 (Wash. 1973) (referring to the common law to determine the scope of the right to a civil jury); W. Va. Road Comm'n v. Boggess, 126 S.E.2d 26, 28–29 (W.Va. 1962) (same); State v. Abbott Labs., 816 N.W.2d 145, 156 (Wisc. 2012) (same); *In re Estate of Cheek*, 53 P.3d 113, 116–17 (Wyo. 2002) (denying civil jury because not given at common law); *see also* Whitehouse, *supra* note 300, at 1250–52 (commenting on the Founders's differing views that the number and differing forms of civil jury trial clauses either made inclusion of any one impractical for federal constitutional law purposes or posed no risk because the popularity of the clause made objection to it odious to the extent of being hated). *But see* Motz v. Jammarron, 676 P.2d 1211, 1213 (Colo. Ct. App. 1983) (holding no entitlement to a civil jury as a matter of right); Tellis v. Lincoln Par. Police Jury, 916 So.2d 1248, 1250 (La. Ct. App. 2005) (noting that because state constitution does not guarantee a right to a civil jury, the applicability of the right must be determined by looking to state statutory law).

³⁵¹ *See Dimick*, 293 U.S. at 486.

³⁵² *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 457 (1993).

³⁵³ *See Dimick*, 293 U.S. at 486. The *Dimick* Court describes the jury trial right as being of ancient origin, but notes that the right is limited to a jury that acts properly. *Id.* at 485–86; *see also* Murphy, *supra* note 279, at 745–46 (1993) (discussing the Founders's perception that juries were not infallible and describing a new trial as the cure for jury error).

³⁵⁴ *Dimick*, 293 U.S. at 478. In cases where the plaintiff asks for a new trial because damages are too small, the court lacks authority to order an increase without consent. *Id.* at 480. In turn where the defendant asks for a new trial because damages were excessive, "the [c]ourt has no power to reduce the damages to a reasonable sum instead of ordering a new trial." *Id.*; *see also* Baldus, *supra* note 25, at 1127–30 (discussing the common law practice of additur and remittitur review).

³⁵⁵ *Dimick*, 293 U.S. at 486. The court's authority to interfere with the verdict depended upon the assent of both parties. *Id.* at 481.

often acted upon or exercised that authority.³⁵⁶ For colonial courts, the exercise of such authority was confined to courts sitting *en banc*,³⁵⁷ but modern procedures have expanded such power to trial courts. There is no evidence that the common law authorized an automatic cap in an amount set by a legislative body. Moreover, current cap legislation does not require an affirmative finding of excessiveness or arbitrariness before damages are reduced.³⁵⁸

This Article suggests that the *Gore* punitive damage analysis should be uncapped where trial judges are not empowered to determine whether a jury's award of compensation is excessive. The *Gore* punitive damage analysis should also be uncapped if the trial judge has had such opportunity and confirms an award that exceeds the cap. Where cap regimes empower trial judges with such authority, the following factors for considering whether a civil jury's compensatory damage award is excessive should apply: (1) the severity of the harm; (2) the length of time during which the injury will exist; and (3) the disparity between the awards of economic and noneconomic damages. In analyzing the severity and length of the injury, trial judges should also consider the following subfactors: (a) the degree of physical and emotional harm caused by the injury; (b) whether the harm will likely increase or decrease over time; (c) whether the harm caused the plaintiff to become physically or financially vulnerable; (d) whether the harm caused the plaintiff to exist in a vegetative state; and (e) whether the harm caused permanent disability, disfigurement, blindness, loss of a limb, paralysis, and cognitive disabilities or other trauma. These factors are intended as a starting point. Courts should be free to consider other factors that focus on the individualized facts and circumstances of a case.³⁵⁹

B. Theory 2

The second rationale for uncapping compensation in the *Gore* punitive damage analysis is the failure to instruct a jury about the existence of the cap before its application. "The ability of the jury to tailor its decision to the facts and circumstances of a particular case . . . is not a vice, but a virtue."³⁶⁰ Unlike a legislatively imposed cap, the *Gore* punitive damage analysis does not disregard the civil jury trial right. Instead, *Gore* balances the right with the necessity of avoiding procedures that unnecessarily deprive a jury of proper legal guidance.³⁶¹ Historically, compensatory

³⁵⁶ *Id.* The *Dimick* Court's analysis revealed that 1733 was the last known exercise of such authority in the English common law. *Id.* at 477 (citing *Burton v. Baynes*, Barnes Practice Cases 153 (1733)). According to the Court, the practice of granting new trials did not come into operation until a later date. *Id.*

³⁵⁷ *Id.* At the time of ratification, this practice was obsolete in England. *Id.*

³⁵⁸ See, e.g., MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-09 (West 2015).

³⁵⁹ See Baldus, *supra* note 25, at 1122–23; Murphy, *supra* note 279, at 734–35.

³⁶⁰ Jeffrey R. White, *State Farm and Punitive Damages: Call the Jury Back*, 5 J. HIGH TECH. L. 79, 89 (2005).

³⁶¹ *Phillip Morris USA v. Williams*, 549 U.S. 346, 355 (2007).

damages have been specifically designed to put a party in the same position before some harm or wrong occurred.³⁶² By necessity, this requires consideration of the specific circumstances of the individual case,³⁶³ which capped compensation schemes fail to do.

In many respects, the factual underpinnings justifying compensatory damage caps are shrouded in mystery. The legislative history accompanying most cap legislation does not include evidence of systemic and wide-spread excessiveness. *Exxon Shipping* found that overall civil jury damage awards demonstrated restraint.³⁶⁴ A plurality of the Florida Supreme Court appeared to agree with *Exxon Shipping* in *Estate of McCall v. United States*.³⁶⁵ The *McCall* plurality maintained that legislative findings were not to be accepted “at face value,”³⁶⁶ noted the lack of specific legislative findings to support claims of excessive civil jury awards in Florida,³⁶⁷ and

³⁶² Lens, *supra* note 171, at 39.

³⁶³ *Id.*

³⁶⁴ *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 497–98 (2007) (surveying literature and finding no evidence of “mass-produced runaway awards” and noting the lack of data to substantiate claims of “marked increase[s] in the percentage of cases with punitive awards over the past several decades”).

³⁶⁵ 134 So. 3d 894, 910 (Fla. 2014). *McCall* was decided on equal protection grounds and only as the cap applied to wrongful death cases. *Id.* at 915. The claims in *McCall* arose out of prenatal and delivery care that resulted in the death of the mother after birth. *Id.* at 897–99. Michelle McCall received care at a United States Air Force clinic’s family practice department during her third trimester of pregnancy. *Id.* at 897. Blood pressure tests revealed that McCall suffered from preeclampsia. *Id.* McCall’s condition required labor to be immediately induced. *Id.* An Air Force obstetrician was requested, but none were available. *Id.* at 898. Thus, family practice doctors transferred McCall to another facility and attempted to induce labor. *Id.* By the time an obstetrician arrived, it was several hours later and McCall had already vaginally delivered a healthy baby boy. *Id.* Nevertheless, the obstetrician was required to deliver the placenta, which the family practice doctors were unable to do. *Id.* By this time, McCall’s blood pressure dropped to a dangerously low level. *Id.* Unfortunately, the obstetrician who delivered the placenta was not aware of McCall’s dangerous condition. *Id.* For an unknown length of time after the second delivery, McCall laid in shock and ultimately went into cardiac arrest. *Id.* at 899. She would never regain consciousness and was removed from life support four days after the birth of her son. *Id.* The civil jury awarded noneconomic damages in the amount of \$2 million, which were reduced to \$1 million. *Id.* This amount included \$500,000 for McCall’s son and \$750,000 for each of her parents. *Id.*

³⁶⁶ *Id.* at 906. While not accepted at face value, legislative findings are presumptively correct. *Id.* Nevertheless, such findings are always subject to judicial inquiry as to whether they are actually factual. *Id.* (noting that courts may defer to legislative findings, but “even then courts must conduct their own inquiry”); *see also* Murphy, *supra* note 279, at 728–29 (identifying the jury trial right as a protectant against “abuses of official power” and describing the jury as a “one-time actor” independent from government influences or the judicial system).

³⁶⁷ *McCall*, 134 So. 3d at 914, 916. On certification from the Eleventh Circuit, *McCall* considered whether section 766.118 of the Florida Statutes violated the right to equal protection contained in Article I, section 2 of the Florida Constitution. *Id.* at 897, 900. Another

held Florida's cap lacked a reasonable relationship to addressing the effects of a medical malpractice crisis.³⁶⁸ Only anecdotal and inaccurate evidence of physician departures in Florida had been presented.³⁶⁹ In fact, the number of doctors licensed to practice in Florida increased in the five years prior to enactment of the cap.³⁷⁰ No credible evidence suggested that patients in Florida were denied or had been directed someplace else for medical care.³⁷¹ Nor were there large increases in frivolous lawsuits.³⁷²

Empirical evidence on the correlation between compensatory damage caps and malpractice premiums is difficult to reconcile.³⁷³ In Florida, the "so-called" medical malpractice crisis was nothing more than an "underwriting cycle,"³⁷⁴ which had

certified question from the Eleventh Circuit involved whether section 766.118 violated the inviolate civil jury trial right contained in Article I, section 22 of the Florida Constitution, which became effective in 1845 (after both the Virginia and Missouri Constitutions but before the Washington and Idaho Constitutions). *Id.* at 897, 915. *McCall* acknowledged that at common law, Florida did not recognize a cause of action for wrongful death and thus the civil jury trial right did not apply. *Id.* at 915. But *McCall* noted that the cap applied to medical malpractice actions resulting in wrongful death *and* personal injury, the latter which "previously existed under the common law." *Id.* The *McCall* plurality declined to determine the caps constitutionality as it applied to common law based personal injury cases, noting that to do so would constitute an impermissible advisory opinion. *Id.*

³⁶⁸ *Id.* at 901. The *McCall* plurality described the cap as imposing arbitrary distinctions. *Id.* at 901–03. Moreover, the cap imposed a devastating cost on a few for the purpose of saving a modest amount for many. *Id.* at 903. According to the *McCall* plurality, section 766.118 improperly burdened "those who are most grievously injured" and "those who sustain the greatest damage and loss." *Id.*; *see also* Murphy, *supra* note 279, at 727–28 (describing rationality as one of the ultimate goals of just adjudication).

³⁶⁹ *McCall*, 134 So. 3d at 909. No credible evidence correlated high malpractice premiums with any specific physician's departure. *Id.*

³⁷⁰ *Id.* The United States General Accounting Office found that from 1991 to 2001, Florida's physician supply per 100,000 people grew 10.7% in metropolitan areas and 19% in nonmetropolitan areas. *Id.* at 906.

³⁷¹ *Id.* at 908.

³⁷² *Id.* In Florida, only 7.5% of cases that resulted in payments of \$1 million or more over a 14-year period involved a jury verdict. *Id.* at 907 (citing Neil Vidmar et al., *Million Dollar Medical Malpractice Cases in Florida: Post-Verdict and Pre-Suit Settlements*, 59 VAND. L. REV. 1343, 1345–46 (2006)). Almost an equal percentage of cases that involved payment of \$1 million or more were resolved without any legal action ever being filed. *Id.* Thus in Florida, jury trials constitute only a very small portion of medical malpractice payments. *Id.*

³⁷³ *See* Wright & Williams, *supra* note 173, at 463. *But see* Joanna M. Shepherd, *Tort Reforms' Winners and Losers: The Competing Effects of Care and Activity Levels*, 55 UCLA L. REV. 905, 925 (2008) (discussing a 1998 study that showed 6% to 8% lower growth in malpractice premiums in cap regimes) (citations omitted).

³⁷⁴ *McCall*, 134 So. 3d at 907. The *McCall* plurality found that authoritative government reports completely undermined the existence of a medical malpractice crisis. *Id.* at 906. Nor was there credible evidence that tort reform flattened insurance rates. *Id.* at 908 (identifying cause of flattening rates as "modulations in the insurance cycle") (citations omitted); *see also id.* at 910 (discussing legislative testimony that a "\$500,000 cap against noneconomic

always occurred in the medical malpractice insurance industry.³⁷⁵ Additionally, the median medical malpractice premium paid by physicians practicing in high-risk specialties (internal medicine, obstetrics/gynecology, and general surgery) rose by 48.2% in states with noneconomic damage caps.³⁷⁶ This compared to 35.9% in states without caps.³⁷⁷ Only 10.5% of states experienced static or declining medical malpractice premium rates following the imposition of a cap.³⁷⁸ States without caps experienced 18.7% static or declining medical malpractice premium rates.³⁷⁹ In Florida, like in most states, insurance companies were not required to pass the savings attributed from the cap onto providers.³⁸⁰ Instead those savings constituted a windfall.³⁸¹ Shockingly, Floridian insurers continued to request rate increases despite more than a 4300% surge in net income following imposition of the cap.³⁸²

Exxon Shipping denied a necessity to curb or check civil juries because of excessive awards.³⁸³ Perhaps more states are beginning to agree. Since the millennium, the national tort reform debate has shifted to whether a medical malpractice crisis ever existed.³⁸⁴ To the extent that a crisis did exist, current data may also show it has

damages would achieve ‘virtually nothing’ with regards to stabilizing medical malpractice insurance rates”) (citations omitted).

³⁷⁵ *Id.* at 908 (citations omitted) (rejecting civil jury awards as the cause of the two most recent medical liability insurance crises, but rather “dramatic increases in the amount of money that the insurance industry put in reserve for claims” after years of leaving claims underreserved).

³⁷⁶ *Id.* at 910 (citation omitted).

³⁷⁷ *Id.*; see also Wright Williams, *supra* note 173, at 463. But see Shepherd, *supra* note 373, at 925 (discussing a 2004 study showing that in cap regimes, medical malpractice premiums were 17.1% lower).

³⁷⁸ *McCall*, 134 So. 3d at 910. This amounted to 2 of 19 states with caps. *Id.*; see also Wright & Williams, *supra* note 173, at 463.

³⁷⁹ *McCall*, 134 So. 3d at 910. This amounted to 6 of 32 states without caps. *Id.* (citation omitted); see also Wright & Williams, *supra* note 173, at 463.

³⁸⁰ *McCall*, 134 So. 3d at 911; see also Wright & Williams, *supra* note 173, at 464.

³⁸¹ *McCall*, 134 So. 3d at 911; see also Wright & Williams, *supra* note 173, at 462 (discussing national studies that showed “rates do not decline with the passage of damage caps” and discussing considerable insurance company profits in states where caps have been enacted).

³⁸² *McCall*, 134 So. 3d at 914. The *McCall* plurality concluded that even if a medical malpractice crisis existed, it was not a permanent condition. *Id.* at 913. Thus, it was unnecessary to punish the most seriously injured plaintiffs by limiting their noneconomic recovery to a fixed, arbitrary amount. *Id.* at 914–15 (noting that healthcare policy cannot be supported when an improper burden is placed “upon the shoulders of the persons and families who have been most severely injured and died as a result of medical negligence”).

³⁸³ *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 497–99 (2007); see also Hensler, *supra* note 12, at 493 (describing jury awards over three categories of personal injury cases: routine personal injuries, higher-stakes torts, and mass latent injury torts; also warning that looking at the overall system of tort litigation ignores the difference in the components across the three categories).

³⁸⁴ See *Exxon Shipping*, 554 U.S. at 497–99.

subsided.³⁸⁵ A 2004 CBO study found that fewer than two percent of patients who were the victims of medical error actually brought a lawsuit.³⁸⁶ Based on research from the states, the primary effects of tort reform were increased profitability for insurers and reduced recovery for plaintiffs.³⁸⁷ Missouri found that its tort reform was likely to have disproportionately burdened classes of plaintiffs who were among those least likely to have the means to pay the upfront costs of bringing a colorable claim for personal injury.³⁸⁸ In Missouri, like in Florida, this included the young, the economically disadvantaged, and those who were most severely injured.³⁸⁹

This Article suggests that the *Gore* punitive damage analysis should be uncapped if a civil jury has not been informed of the existence of a compensatory damage cap. The *Gore* punitive damage analysis should also be uncapped if the jury has been informed of the cap, but still returns an award that exceeds the cap. A jury should be properly informed about the law, but some states prohibit informing the jury about the existence of the cap.³⁹⁰ It is unclear whether the jury is warned about the existence of the cap in those states that do not expressly prohibit the trial judge from doing so. This Article does not argue that a jury should be informed of the amount of the cap, but merely of its existence.

This Article proposes the following jury instruction on the existence of a compensatory damage cap for those states that either prohibit or fail to inform the jury of the cap's existence:

Members of the Jury:

This instruction is given as a guide for calculating the amount of compensatory damages if you find that the plaintiff is entitled to them. If you decide

³⁸⁵ *McCall*, 134 So. 3d at 914; *see also* Yeazell, *supra* note 10, at 1789 (“No one who has studied health care believes that malpractice litigation makes a major contribution to health costs . . .”).

³⁸⁶ CONG. BUDGET OFFICE, THE EFFECTS OF TORT REFORM: EVIDENCE FROM THE STATES 18 (2004).

³⁸⁷ *Id.* at x, 12.

³⁸⁸ Jeffrey Herman, *Missouri Tort Reform and Medical Malpractice*, COVER MISSOURI, Spring 2012, at 11.

³⁸⁹ *Id.*; *see also* *McCall*, 134 So. 3d at 906 (rejecting contention that noneconomic damage awards were a key factor behind the alleged unavailable and unaffordable medical malpractice insurance in Florida); Baldus, *supra* note 25, at 1122–23 (arguing that caps cannot be morally justified); Whitehouse, *supra* note 300, at 1271 (“When you are alone . . . the hard square corners of the jury box stand firm against the tide of influence and money.”).

³⁹⁰ *See* COLO. REV. STAT. § 13-64-302 (2015); IDAHO CODE ANN. § 6-1603 (West 2015); KAN. STAT. ANN. § 60-19a02 (2015); MD. CODE ANN. CTS. & JUD. PROC. § 3-2A-09 (West 2015); MO. REV. STAT. § 538.210 (2015), *declared unconstitutional by* *Watts v. Cox*, Med. Ctr., 576 S.W.3d 633 (Mo. 2012); MONT. CODE ANN. § 25-9-411 (2015); N.M. STAT. ANN. 1978 § 41-5-6 (West 2015); N.C. GEN. STAT. ANN. § 90-21.19 (West 2015); N.D. CENT. CODE § 32-42-02 (2015); OHIO REV. CODE ANN. §§ 2323.43 (West 2015); OKLA. STAT. ANN. tit. 23 § 61.2 (West 2015); TENN. CODE ANN. § 29-39-102 (West 2012).

that the plaintiff is not entitled to recover compensatory damages, then you are instructed to disregard this instruction.

If you decide that the plaintiff is entitled to recover compensatory damages because the defendant caused the plaintiff harm, you must decide how much money will fairly and adequately compensate the plaintiff for that harm.

There are two kinds of compensatory damages: economic and noneconomic damages.

Economic damages are the amount of money that will fairly and adequately compensate the plaintiff for measurable losses of money or property caused by the defendant. In determining the plaintiff's economic loss, you may consider objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.

Noneconomic damages are amounts to compensate the plaintiff for past or future physical pain or mental suffering, including the loss of enjoyment of life, disfigurement, physical impairment, inconvenience, grief, anxiety, humiliation, emotional distress, and other damages where applicable. No fixed standard exists for deciding the amount of noneconomic damages.

In determining the plaintiff's noneconomic loss, you may consider:

- 1. The severity of the harm;*
- 2. The length of time during which the injury will exist; and*
- 3. The disparity between your award of economic damages and your award of noneconomic damages.*

In analyzing the severity and length of harm, you may also consider:

- a. The degree of physical and emotional harm caused by the injury;*
- b. Whether the harm will likely increase or decrease over time;*
- c. Whether the harm caused the plaintiff to become physically or financially vulnerable;*
- d. Whether the harm caused the plaintiff to exist in a vegetative state; and*
- e. Whether the harm caused permanent disability, disfigurement, blindness, loss of a limb, paralysis, cognitive disabilities or other trauma.*

You must use your judgment to decide a reasonable amount of damages based on the evidence presented in the case and your common sense. However, you should be aware that the legislature of this State has limited the amount of compensatory damages that can be recovered in this type of case. You should not, however, feel obligated to limit your compensatory damage award based on this information.

The jury constitutes the “black box” of the American justice system and plays an important role in American jurisprudence.³⁹¹ The essence of trial by jury is that controverted facts are to be decided by a jury. Some states have effectively abolished the civil jury trial right to damages that exceed a cap. Even though courts permit legislatures flexibility when making changes to the jury practice, legislative action that is clearly erroneous should not be blindly or forever followed. The Framers of the federal Constitution sought independence in part due to the Crown’s deprivation of the “benefits of trial by jury.”³⁹² One benefit (or burden) of the civil jury trial right is judgment as the jury sees fit. Only fair procedures and clear instructions will endear confidence in the jury’s award. This instruction is intended as a starting point and courts should be free to consider other instructions that focus on the individualized facts of a case.

C. Theory 3

The third rationale for uncapping compensation in the *Gore* punitive damage analysis is the failure of cap legislation to allow the civil jury to reconsider or confirm an award that exceeds the cap. State and federal courts agree that “damages must be assessed by the jury” if the cause of action is analogous to a common law case that existed at the time of ratification of the State or Federal Constitution.³⁹³ At the time the Federal Constitution was ratified in 1791, the parties in common law cases were entitled to have a jury determine liability and damages—both of which were questions of fact.³⁹⁴ In other words, both parties were entitled to have a jury determine “the question of liability and the extent of the injury by an assessment of

³⁹¹ White, *supra* note 360, at 136.

³⁹² THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

³⁹³ *Dimick v. Schiedt*, 293 U.S. 474, 478 (1935). *Dimick* involved personal injuries caused by the alleged negligent operation of an automobile on a public highway. *Id.* at 475. The plaintiff argued the jury’s \$500 award was inadequate and requested a new trial. *Id.* The motion was denied immediately after the defendant consented to a \$1000 increase in damages. *Id.* at 475–76. A Seventh Amendment violation occurred because the trial court lacked authority to condition the denial of a new trial on defendant’s agreement to an increase of damages. *Id.* at 476.

³⁹⁴ *Id.*

damages.”³⁹⁵ Additionally, common law courts lacked authority to alter the civil jury’s damage award in an action for personal injury.³⁹⁶

A jury determination of disputed facts is the essence of the civil jury trial right,³⁹⁷ which is derived from the Magna Carta.³⁹⁸ A jury determination of disputed facts also constitutes a core common law practice. In the common law and in early colonial practice, once the right to the jury attached certain questions required a jury determination.³⁹⁹ State courts agree with federal jurisprudence that a civil jury is required for actions that are analogous to “[s]uits at common law,” as opposed to cases traditionally tried in courts of equity or admiralty.⁴⁰⁰

Most states also agree that both the nature of the action⁴⁰¹ and the remedy sought must be examined in order to determine where a case would have been tried.⁴⁰² Under

³⁹⁵ *Id.* at 486; *see also id.* at 478 (“[I]n all cases sounding in damages these damages must be assessed by the jury and not by the court independently thereof.”); *id.* at 490 (Stone, J., dissenting) (describing the Seventh Amendment’s purpose as preserving “the essentials of the jury trial as it was known to the common law before adoption of the Constitution”). It appears that, in some cases, authority was exercised to increase or abridge the jury’s award, but only where the amount of damages was certain. *Id.* at 479. This rule did not apply in personal tort actions unless the evidence before the court required a correction of the amount of damages. *Id.* Thus, unless the parties agree, courts had no power to add or reduce damages to a reasonable sum where a new trial was requested. *Id.* at 480; *see also* Murphy, *supra* note 279, at 746 (describing jury fact-finding as not an ends in itself, but a means towards achieving just adjudication); Murphy, *supra* note 9, at 363 n.83 (citations omitted) (arguing that based on precedent, the Court “considers assessment of compensatory damages to be more fundamental to the right to jury trial than the determination of liability”).

³⁹⁶ *Dimick*, 293 U.S. at 476–77 (examining preratification reports and failing to find any general authoritative decision sustaining the power of an English court to increase the amount of damages fixed by a jury). To the extent that judicial discretion existed to abridge or supplement a jury’s verdict, such discretionary authority was rarely exercised. *Id.* at 480. When an award was excessive, it was unusual for a court to suggest a sum to prevent the necessity of a new trial. *Id.*; *see also* Lord Townsend v. Hughes, 86 Eng. Rep. 994, 994–95 (C.P. 1677) (“By the law the jury are the judges of damages . . .”).

³⁹⁷ Lerner, *supra* note 340, at 844 (citing *Bothwell v. Bos. Elevated Ry.*, 102 N.E. 665, 669 (Mass. 1913)).

³⁹⁸ *Id.* at 820.

³⁹⁹ *Id.* at 817 (explaining that the common law reserved questions of fact for the jury).

⁴⁰⁰ *See* *Tull v. United States*, 481 U.S. 412, 417 (1987). *Tull* involved claims for violation of the Clean Water Act, which protected pollution into navigable waters and its adjacent swamps, marshes, bogs, and other similar areas. *Id.* at 414 (citing 33 U.S.C. §§ 1311, 1344, & 1362(7); 33 C.F.R. §§ 323.2(a)(1)–(7), (c) (1986)). The defendant unsuccessfully demanded a jury. *Id.* at 415. After a fifteen day bench trial, the judge concluded that the defendant illegally filled in wetland areas and ordered injunctive relief. *Id.* at 415–16. The Fourth Circuit affirmed the denial of a jury. *Id.* at 416. The Supreme Court granted certiorari to resolve the conflict between the circuits on the issue of whether the Seventh Amendment’s civil jury trial guarantee applies “‘when the United States sues . . . to collect a [statutory civil] penalty.’” *Id.* at 416–17 (citation omitted).

⁴⁰¹ *Id.* at 417.

⁴⁰² *Id.*

this approach, a court must first ask whether the cause of action is similar to eighteenth-century cases brought in courts of law prior to the merger of law and equity in the English common law.⁴⁰³ Next a court must ask whether the requested remedy is legal or equitable in nature.⁴⁰⁴ It is firmly established that in the common law private wrongs such as torts were brought in courts of law, not equity or admiralty.⁴⁰⁵

Compensatory damage caps abolish the right to a jury determination of damages over a certain amount.⁴⁰⁶ Blackstone's principle argument in favor of juries was to prevent arbitrary and capricious interference of the government.⁴⁰⁷ State and federal bills of right included the civil jury trial among the individual rights retained by the people.⁴⁰⁸ Yet, the current state supreme court split on the constitutionality of compensatory damage caps exists even among courts interpreting identical constitutional civil jury trial clauses.⁴⁰⁹

This Article suggests that the *Gore* punitive damage analysis should be uncapped where a civil jury has not been allowed to reconsider or confirm its award of compensatory damages. The *Gore* punitive damage analysis should also be uncapped where a jury has had such opportunity and still returns an award that exceeds the cap. Many states prohibit informing the jury of the existence of the cap.⁴¹⁰ Only

⁴⁰³ *Id.*

⁴⁰⁴ *Id.* at 417–18. The *Tull* Court reasoned that “[a]fter the adoption of the Seventh Amendment, federal courts followed the English common law in treating the civil penalty suit as a particular type of an action in debt, requiring a jury trial.” *Id.* The Court warned its analysis was not precise. *Id.* at 421. The goal was not to engage in an “‘abstruse historical’ search for the nearest [eighteenth]-century analog.” *Id.* (citation omitted). The relief sought was more important than finding a precise common law analogy. *Id.* The Court held that the government’s demand for civil penalties under the Clean Water Act was clearly analogous to debt actions that could be enforced in a court of law. *Id.* at 422–23. But the right to a jury was not deemed to apply to all questions. *Tull* distinguished findings on *liability* from findings on the amount of the *fine*. *Id.* at 425 (explaining that defendant has a “constitutional right to a jury trial to determine his liability on legal claims”). *Tull* found no right to a jury assessment of the *penalty* itself. *Id.* at 425–26. On this question the common law offered no resolution. *Id.* In the U.S. legal tradition *civil penalties* were fixed by Congress. *Id.* at 426. Nor was the assessment of a civil penalty an essential function of a jury. *Id.* at 426–27 (describing the assessment of a civil penalty as “highly discretionary calculations” that were traditionally performed by judges).

⁴⁰⁵ Lens, *supra* note 323, at 601.

⁴⁰⁶ Murphy, *supra* note 9, at 349–50.

⁴⁰⁷ Lerner, *supra* note 340, at 832–33 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *379).

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.* at 841 (citing *Beers v. Beers*, 4 Day 535, 539 (Conn. 1823)); *see also id.* at 843 (citing *Flint River Steamboat Co. v. Foster*, 5 Ga 194, 208 (1848) (“There is no invasion or infringement of the Constitution so long as trial by jury is not directly or indirectly abolished.”)).

⁴¹⁰ *See* COLO. REV. STAT. § 13-64-302 (2015); IDAHO CODE ANN. § 6-1603 (West 2015); KAN. STAT. ANN. § 60-19a02 (2015); MD. CODE ANN. CTS. & JUD. PROC. § 3-2A-09 (West 2015); MO. REV. STAT. § 538.210 (2015), *declared unconstitutional by* *Watts v. Cox Med.*

Massachusetts allows the jury to consider whether application of the cap is just or fair to the plaintiff.⁴¹¹ Thus, in all cap regimes but Massachusetts, the jury's award will be ignored even where a party has successfully proven damages.⁴¹²

This Article proposes the following instruction urging a jury to reconsider or confirm its award of compensatory damages:

Members of the Jury:

I'm going to ask that you continue your deliberations to reconsider or confirm the reasonability of your compensatory damage award. You should be aware that the legislature of this State has limited the amount of compensatory damages that can be recovered in this type of case. You should not, however, feel obligated to limit your compensatory damage award based on this information. This instruction is given as a guide for continuing your deliberations.

No juror is expected to abandon an honest belief that he or she may have as to the weight or effect of the evidence. But after full deliberation and consideration of the evidence in the case, it is your duty to award a reasonable amount of damages. You may be as leisurely in your deliberations as the occasion may require and should take all the time which you may feel is necessary.

I will ask now that you retire once again and continue your deliberations with these additional comments in mind. Of course, this instruction is to be applied in conjunction with all of the previous instructions I have given to you.

This instruction finds its inspiration in the *Allen* charge in criminal cases.⁴¹³ The *Allen* charge is an award-inducing instruction that is commonly used when a criminal jury is unable to reach an acceptable verdict.⁴¹⁴ The *Allen* charge has been approved as a "subtle method of encouraging jurors to reach awards."⁴¹⁵ Some courts have expressed concern about the coercive nature of the *Allen* charge, but its use as

Ctr., 576 S.W.3d 633 (Mo. 2012); MONT. CODE ANN. § 25-9-411 (2015); N.M. STAT. ANN. 1978 § 41-5-6 (West 2015); N.C. GEN. STAT. ANN. § 90-21.19 (West 2015); N.D. CENT. CODE § 32-42-02 (2015); OHIO REV. CODE ANN. § 2323.43 (West 2015); OKLA. STAT. ANN. tit. 23 § 61.2 (West 2015); TENN. CODE ANN. § 29-39-102 (West 2012).

⁴¹¹ See MASS. GEN. LAWS ch. 231, § 60H (2015).

⁴¹² See Yeazell, *supra* note 10, at 1784; Thomas, *supra* note 153, at 1235–37.

⁴¹³ See generally *Allen v. United States*, 164 U.S. 492 (1896).

⁴¹⁴ Karen P. O'Sullivan, *Deadlocked Juries and the Allen Charge*, 37 ME. L. REV. 167, 167 (1985).

⁴¹⁵ *Id.*

a method of avoiding the expense of a new trial has continued.⁴¹⁶ Like that which has been previously proposed, this instruction is intended as a starting point. Courts should be free to consider other instructions that emphasize the individualized facts of a case.

CONCLUSION

Whether and to what extent the Court will recognize that compensatory damage caps implicate the *Gore* punitive damage analysis remains unknown. Neither general claims of excessiveness nor a medical malpractice “crisis” appears to justify the imposition of capped compensation in all or even a certain category of common law–based tort cases. Caps result in a damage award that is arbitrary or trivial. Cap legislation presumes excessiveness and only prevents awards that exceed a certain amount (even if evidence exists to support the jury’s higher award).⁴¹⁷ Individual review upon necessity is essential to any method that allows reconsideration of a civil jury’s award, which is a key failure of state law compensatory damage caps.

This Article advocates uncapping compensation in the *Gore* punitive damage analysis under three circumstances. First, where trial judges are not allowed to review a civil jury’s award for reasonableness (or if the trial judge has had such opportunity and confirms an award that exceeds the cap). Second, if the civil jury has not been informed of the existence of a compensatory damage cap (or if the civil jury has been so informed but still returns an award that exceeds the cap). Finally, where the civil jury has no opportunity to reconsider or confirm an award that exceeds the cap (or where the civil jury has had such opportunity and affirmed an award that exceeds the cap). Without such protections, the *Gore* punitive damage analysis fails to advance its dual obligation in civil litigation to one, protect civil defendants against unreasonably high awards, and two, guard severely injured plaintiffs against arbitrarily low awards.

⁴¹⁶ *Id.* at 168–73.

⁴¹⁷ See Murphy, *supra* note 9, at 347–51.